STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kurtis T. Wilder, Presiding Judge

MAJESTIC GOLF, LLC, a Michigan limited liability company,

Plaintiff/Counter-Defendant/
Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC., a Michigan Corporation,
Defendant/Counter-Plaintiff/
Appellant.

Supreme Court No. 145988

Court of Appeals No. 300140
Livingston County Circuit Court No.
09-24146-CZ

MICHIGAN GOLF COURSE OWNERS ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF THE POSITION ON APPEAL OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT, LAKE WALDEN COUNTRY CLUB, INC.

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT vi

STATEMENT OF QUESTION PRESENTED vii

I. INTRODUCTION AND STATEMENT OF INTEREST 1

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS 2

III. ARGUMENT 5

Standard Of Review 5

A. The Material Breach Doctrine Is An Important Part Of This State's Jurisprudence 6

B. The Material Breach Doctrine Should Not Be Limited To Recision Cases And Can Be Applied To Forfeiture Cases 11

C. The Court Of Appeals Has Previously Applied The Material Breach Doctrine To A Forfeiture Claim 14

D. Applying The Material Breach Doctrine To Commercial Lease Forfeiture Claims Is Consistent With The Many Areas Of Michigan Common Law On Contracts In Which Equitable Principles Are Applied To Avoid Underlying Harsh Results 17

E. The Case Law Of Other States Supports Application Of The Material Breach Doctrine In Lease Forfeiture Cases 19

F. All Equitable Factors Weigh In Favor Of Reversing The Court of Appeals and Upholding The Circuit Court's Refusal To Terminate The Lease 26

IV. CONCLUSION/RELIEF REQUESTED 29

INDEX OF AUTHORITIES

Page

CASES

Able Demolition, Inc v City of Pontiac, 275 Mich App 577; 739 NW2d 696 (2007) 14

Brunsell v Zeeland, 467 Mich 293; 651 NW2d 388 (2002) 5

Bucholz v Green Bros, Co, 272 Mass at 52, 172 NE 101 24

Campbell v Homer Ore Co, 309 Mich 693; 16 NW2d 125 (1944) 12

City of Grand Rapids v Consumers Power Co, 216 Mich 409; 185 NW 852 (1921) 1

Cleveland-Cliffs Iron Co v Chicago & North Western Transportation Co, 581 F Supp 1144 (1984) 10

Collins v McKinney, 871 NE2d 363, 375 (2007) 23

Consoer Townsend Envirodyne Engineering, Inc v City of Grand Rapids, unpublished opinion per curium of the Court of Appeals issued September 22, 2009 (Docket No. 283563), 2009 WL 3013258 (Mich App, 9/22/09) 14

DiBella v Fiumara, 63 Mass App Ct 640; 828 NE2d 534 (2005) 24, 25

Fill v Arrow Wrecking, Inc, 26 Mich App 462; 182 NW2d 744 (1971) 10

Flamm v Scherer, 40 Mich App 1; 198 NW2d 702 (1972) 17

Foundation Development Corp v Lohmann's, Inc, 163 Ariz 438; 788 P2d 1189 (1990) 21, 22, 25

Frazier v Mellowitz, 804 NE2d 796 (2004) 24

Geno Enterprises, Inc v Newstar Energy USA, Inc, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No. 232777), 2003 WL 21299926 (Mich App, 6/5/03) 14-18, 26

Goff v Graham, 159 Ind App 324; 306 NE2d 758 (1974 23

Holtzlander v Brownell, 182 Mich App 716; 453 NW2d 295 (1990) 9

Kent v Bell, 374 Mich 646; 132 NW2d 601 (1965) 11

Keyworth v Wiechers, 273 Mich 347; 263 NW 57 (1934) 13

Kiriakides v United Artists Communications, Inc, 312 SC 271; 440 SE2d 364 (1994) . . 19-21

Maleki v Desert Palms Professional Properties, LLC, 222 Ariz 327; 214 P2d 415 (2009) . . . 22

Michaels v Amway Corp, 206 Mich App 644; 522 NW2d 703 (1994) 17

Omnicom of Michigan Giannetti Inv Co, 221 Mich App 341; 561 NW2d 138 (1997) 10

P.A.L. Investment Group, Inc v Staff-Builders, Inc, 118 F Supp2d 781 (ED Mich, 2000) . . . 10

Page Two, Inc v PC Management, Inc, 517 NE2d 103 (1987) 23

Price v High Pointe Oil Co, Inc, 493 Mich 238; 828 NW2d 660 (2013) 13

Rose v The National Auction Group, 466 Mich 453; 646 NW2d 455 (2002) 11

Schmalfeldt v North Pointe Ins Co, 469 Mich 422; 670 NW2d 651 (2003) 6

Smith v Independent Order of Foresters, 245 Mich 128; 222 NW2d 166 (1928) 11, 26

Superior Motels, Inc v Rinn Motor Hotels, Inc, 195 Cal App 3d 1032; 241 Cal Rptr 487 (1988) 22, 23, 25

Tierney v McKay, 232 Mich 609; 206 NW 325 (1925) 11

VND, LLC v Leevers Foods, Inc, 672 NW2d 445 (North Dakota, 2004) 25

Walker & Co v Harrison, 347 Mich 630; 81 NW2d 352 (1957) 7-11, 26

White v Huber Drug Co, 190 Mich 212; 157 NW 60 (1916) 12

COURT RULES

MCR 7.301(A)(2) vi

MCR 7.302 vi

STATUTES

MCL 554.46 18

MCL 600.5701 15

OTHER

Michigan Lease Drafting and Landlord-Tenant Law, §4.8, 4-9 (2009) 28

Restatement (First) of Contracts, §275 (1932) 6-8, 10, 23, 26

Restatement (Second) of Contracts, §241 (1981) 7, 20-22, 24, 25

SC Code §27-37-10 (1991) 19, 20

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Amicus Curiae, Michigan Golf Course Owners Association, states that this Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302, an Application for Leave to Appeal (the "Application") from the August 30, 2012 Order Denying Motion for Reconsideration of the July 10, 2012 Opinion of the Michigan Court of Appeals (the "COA Opinion") having been timely filed on October 10, 2012 and granted on April 3, 2013. For the reasons discussed below, the COA Opinion should be reversed and the decision of the Circuit Court reinstated.

STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS ERR BY FAILING TO APPLY THE MATERIAL BREACH DOCTRINE: (1) AS A LEGAL DOCTRINE; NOT A CONTRACT TERM; AND (2) IN CONTRAVENTION OF PUBLIC POLICY DISFAVORING FORFEITURES?

The Court of Appeals answered, "No."

The Circuit Court answered, "Yes."

Defendant/Appellant answers, "Yes."

Plaintiff/Appellee answers, "No."

Amicus Curiae, Michigan Golf Course Owners Association answers, "Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Golf Course Owners Association (the "Association") represents public and privately owned golf courses throughout the State of Michigan. The Association is comprised of approximately 300 golf course members – ranging from small courses to large resorts. The Association serves to promote, protect, and educate its members. One of the primary goals of the Association is to create a level playing field for all golf courses in the state. To promote this goal, the Association seeks to oppose laws and court decisions which delay, restrict, or otherwise impede the ability of a member to conduct golf business in Michigan.

At issue in this appeal are the rights of Appellant, Lake Walden Country Club, Inc. ("LWCC") to continue to operate its championship 27-hole golf course, which it paid over $6 million to build, on land leased from Plaintiff/Appellee, Majestic Golf, LLC ("Majestic"). After receiving more than $1.6 million in rent from LWCC over the last fifteen (15) years, Majestic filed this action to evict LWCC and keep the golf course for itself. The Circuit Court refused to do so finding that although LWCC may have technically breached the parties' lease, the breach was not material such as would warrant a forfeiture and LWCC's loss of its multi-million dollar investment. The Court of Appeals, in a published opinion, reversed, finding that the material breach doctrine was not a term of the parties' lease and, therefore, could not be used to defeat Majestic's forfeiture action. The result of the Opinion of the Court of Appeals is the ultimate closure of the "Majestic at Lake Walden." The Association obviously opposes this result.

The implications of the COA Opinion, and the issues raised by that opinion, are critical to Association members. In *City of Grand Rapids v Consumers Power Co*, 216 Mich 409,

415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association believes that this is a case of important public interest, and the outcome of this case is of continued and vital concern to the Association and its members. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. Accordingly, the Association seeks leave to file a Brief Amicus Curiae in support of LWCC.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Association generally accepts the Statement of Facts contained in Defendant/Appellant's Brief on Appeal, as highlighted by the following:

1. Beginning in 1992, LWCC leased land (approximately 342 acres) from Majestic (the "Leased Premises").

2. From 1992 to 1995, LWCC constructed a 27-hole golf course, clubhouse, and related facilities (the "Golf Facility") on the Leased Premises at its own cost of more than $6 million.

3. From 1992 to present, LWCC has timely paid Majestic over $1.6 million in rent and has paid all property taxes, maintenance and repair costs, all utility bills, and all insurance costs.

4. The term of the parties' "Lease" is 25 years with an option for LWCC to purchase the Golf Facility, exercisable at any time during the final 10 years of the Lease term (the "Option").

5. The land surrounding the Leased Premises is owned by the sole member of Majestic, Waldenwoods Properties, LLC ("Waldenwoods").

6. At the time that the Lease was signed in 1992, it was anticipated that Waldenwoods would develop single-family homes on the property surrounding the Leased Premises which would complement the Golf Facility and vice-versa. Waldenwoods has never started this contemplated development.

7. Beginning in March of 2003, representatives of LWCC and Majestic began discussing a merger of the two entities. A merger had appeal to both parties since a merger of the two entities would avoid LWCC's exercise of the Option which would, in turn, avoid a potentially contentious valuation of the Property.

8. During the course of the merger negotiations, Majestic first requested an easement from LWCC. An initial draft of an "Easement Agreement" was provided by Majestic in April 2007 and revised by Majestic in November 2007. Thereafter, in December 2007, the first set of merger documents were drafted incorporating the Easement Agreement as one of the many documents to be delivered upon the closing of the merger. The reference to the Easement Agreement as an exhibit to the merger document continued throughout all subsequent drafts of the merger documents, including the drafts from Majestic. Merger negotiations continued until November 2008.

9. On October 7, 2008, Majestic sent a letter to LWCC enclosing its draft of the Easement Agreement, unchanged in any substantive way from its earlier versions, and requesting LWCC's consent to the Easement Agreement. The next day, on October 8, 2008,

Majestic again requested that LWCC agree to its Easement Agreement. Yet, on October 13, 2008, Majestic sent LWCC a lengthy letter in which "problems" with the parties' merger negotiations (specifically, LWCC's refusal to grant Waldenwoods the unfettered right to cut trees, etc. on the Golf Course) were discussed at length – without any mention of the Easement Agreement.

10. On November 24, 2008, Majestic, through its attorney, sent a letter to LWCC's President enclosing a form Notice to Quit – Termination of Tenancy indicating that LWCC must move out of the Golf Facility by December 24, 2008. Majestic's counsel advised that LWCC had defaulted under paragraph 26(D) of the Lease by reason of its failure to execute and deliver the Easement Agreement which had been sent to LWCC on October 6 [sic], 2008.[1]

11. LWCC responded through its counsel on December 11, 2008 advising Majestic's counsel that there had been no default under the Lease for the reasons that: (1) the Easement Agreement (specifically, the timing thereof) was not being negotiated under the Lease but, rather, in the context of the merger – which had obviously not yet occurred; (2) the parties had not reached an agreement as to the terms of the Easement Agreement; and (3) Majestic had not provided LWCC with a 30-day default notice to cure as required by the "Notice Provision" of the Lease. LWCC's counsel also provided a copy of the Easement Agreement to which LWCC would agree. Ultimately, on June 16, 2010, an "agreed upon" Easement Agreement was recorded with the Livingston County Register of Deeds.

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[1] The actual date of the letter is October 7, 2008. This letter will hereafter be referred to by its correct date.

12. On December 22, 2008, Mr. LWCC provided notice to Majestic of LWCC's exercise of the Option under paragraph 17 of the Lease. In response, Majestic filed this lawsuit.

13. In ruling on cross-motions for summary disposition, the Circuit Court found that LWCC's failure to provide the Easement Agreement within 30 days of the October 7, 2008 letter from Majestic to LWCC constituted a breach of the Lease. Trial Court Opinion ("Tr Ct Op"), 12/23/09, pp 4-5, Exhibit A. However, the Circuit Court further found that while LWCC committed a technical breach of the Lease, that breach did not rise to the level of a material breach which would permit Majestic to terminate the Lease and, by consequence, LWCC's Option. Tr Ct Op, 12/23/09, pp 5-6, Exhibit A.

14. Majestic filed a Motion for Reconsideration, which the Circuit Court denied. Trial Court Opinion on Reconsideration ("Tr Ct Op on Recon"), 3/30/10, p 3, Exhibit B.

15. The Court of Appeals reversed, finding that unambiguous contracts must be enforced as written, that the material breach doctrine was not a term of the Lease, and the Circuit Court erred by failing to enforce the forfeiture provision of the Lease based on LWCC's breach not being a "material breach." The Court of Appeals Opinion ("COA Op") is attached as Exhibit C.

III. ARGUMENT

Standard Of Review – This Court reviews de novo a trial court's grant or denial of summary disposition. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002).

The interpretation of a contract is also reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

A. The Material Breach Doctrine Is An Important Part Of This State's Jurisprudence

At the heart of this dispute is the application of the "material breach doctrine" under Michigan common law. The material breach doctrine is just that – a legal doctrine (as opposed to a contract term) found in the Restatement of Contracts. Specifically, the Restatement (First) of Contracts, published in 1932, provided:

> In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
>
> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
>
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
>
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
>
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The wilful, negligent or innocent behavior of the party failing to perform;
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

Restatement (First) of Contracts, §275 (1932). In 1981, the material breach doctrine was revised as follows:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failures, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts, §241 (1981).

This Court adopted the material breach doctrine from the Restatement (First) of Contracts in 1957 in the context of a lease recision claim. In *Walker & Co v Harrison*, 347 Mich 630; 81 NW2d 352 (1957), plaintiff, Walker & Company ("Walker"), as lessor, entered into a written lease agreement with defendant, Harrison, as lessee, for the rental of a neon sign to be constructed and maintained by Walker. At the conclusion of the 36-month term of the lease, title to the sign was to revert to Harrison. Harrison made his first payment under the lease and, shortly thereafter, called Walker for maintenance of the sign. Walker did not respond and Harrison ceased making rental payments. Walker sued for the entire balance due under the lease. Harrison claimed that Walker's failure to perform maintenance constituted a prior material breach of the lease permitting repudiation of the lease. *Walker*, 347 Mich at

633-634. The lease at issue did not specifically require a "material" breach for its recision. Nonetheless, the Court stated:

> There was no valid ground for defendants' repudiation and their failure thereafter to comply with the terms of the contract was itself a **material breach**, entitling Walker, upon this record, to judgment.

Walker, 347 Mich at 636 (emphasis supplied). In reaching this conclusion, this Court relied upon the Restatement (First) of Contracts.

> What is our criterion for determining whether or not a breach of contract is so fatal to the undertaking of the parties that it is to be classed as 'material'? There is no single touchstone. Many factors are involved. They are well stated in section 275 of Restatement of the Law of Contracts in the following terms:
>
> 'In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
>
> '(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
>
> '(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
>
> '(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
>
> '(d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> '(e) The wilful, negligent or innocent behavior of the party failing to perform;
>
> '(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.'

Walker, 347 Mich at 635. These "factors" continue to be the "touchstones" of the material breach doctrine under Michigan common law today.

> Thus, plaintiffs' failure to properly transfer title in the junk cars to defendants was a breach of plaintiffs' duties under the sale contract. However, the agreement was not merely for the purpose of acquiring the junk cars alone. Rather, the agreement was for the transfer of the ongoing business as a whole. In order to warrant recision, there must be a material breach affecting a substantial or essential part of the contract. *Walker & Co v Harrison,* 347 Mich 630, 635, 81 NW2d 352 (1957); *O'Conner v Bamm,* 335 Mich 438, 444, 56 NW2d 250 (1953); *Hisaw v Hayes,* 133 Mich App 639, 642, 350 NW2d 302 (1984). One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive. *Walker & Co, supra.* In this case, all the defendants expected to receive was the use of the junk vehicles for parts in operating the business. We find that defendants received the benefit of their bargain, notwithstanding plaintiffs' failure to properly transfer title to the junk vehicles, and, therefore, the trial court's refusal to grant recision of the sale contract was not error.

Holtzlander v Brownell, 182 Mich App 716, 721-722; 453 NW2d 295 (1990).

> In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract. *Holtzlander v Brownell,* 182 Mich App 716, 721, 453 NW2d 295 (1990). In determining whether a breach is material, the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive. *Id.* at 722, 453 NW2d 295. Other considerations include the extent to which the injured party may be adequately compensated for damages for lack of complete performance, the extent to which the breaching party has partly performed, the comparative hardship on the breaching party in terminating the contract, the wilfulness of the breaching party's conduct, and the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. *Walker & Co v Harrison,* 347 Mich 630, 635, 81 NW2d 352 (1957).

Omnicom of Michigan Giannetti Inv Co, 221 Mich App 341, 348; 561 NW2d 138 (1997). *See also, Cleveland-Cliffs Iron Co v Chicago & North Western Transportation Co,* 581 F Supp 1144 (1984) (While there is no single definition of materiality, factors to be considered in determining, under Michigan law, whether to allow repudiation or recision of a contract, include extent to which injured party will obtain substantial benefit which he reasonably anticipated, extent to which injured party may be adequately compensated in damages, extent of partial performance, relative hardship on parties, and bad faith of breaching party.); *Fill v Arrow Wrecking, Inc,* 26 Mich App 462, 466; 182 NW2d 744 (1971) (. . . was a major breach of contract because it denied to plaintiff 'the substantial benefit which he could have reasonably anticipated.' 1 Restatement Contracts, §275, p 402; *Walker & Company v Harrison* (1957), 347 Mich 630, 81 NW2d 352); and *P.A.L. Investment Group, Inc v Staff-Builders, Inc,* 118 F Supp2d 781 (ED Mich, 2000) (Under Michigan law, where breach of contract substantially limits non-breaching party from receiving benefit of his or her bargain, breach is deemed material and victim of breach may rescind deal).

In sum, the material breach doctrine is firmly a part of this State's common law and may properly be applied notwithstanding the absence of a specific contract term requiring a material breach for an award of recision. As discussed below, the same may be true with respect to an award for forfeiture.

B. The Material Breach Doctrine Should Not Be Limited To Recision Cases And Can Be Applied To Forfeiture Cases

As a matter of policy, forfeiture, an equitable remedy, is disfavored under Michigan law. *Smith v Independent Order of Foresters,* 245 Mich 128, 134; 222 NW2d 166 (1928).

> It is the general rule, which this court has more than once recognized, that the law does not favor forfeitures, provisions for them are to be strictly construed, and to sustain them the proof must be clear and convincing. *Hilsendegen v Hartz Clothing Co,* 165 Mich 255, 130 NW 646; *White v Huber Drug Co,* 190 Mich 212, 157 NW 60; *Miller v Pond,* 214 Mich 190, 183 NW 24, 17 ALR 179. In *Taylor on Landlord and Tenant* (8th Ed) §489, it is said that a forfeiture can only be enforced when there is 'such a breach shown as it was the clear and manifest intention of the parties to provide for.'

Tierney v McKay, 232 Mich 609, 619; 206 NW 325 (1925). Equitable remedies are flexible. *Kent v Bell,* 374 Mich 646, 652; 132 NW2d 601 (1965). And, to be awarded equity, one must do equity. *Rose v The National Auction Group,* 466 Mich 453, 461; 646 NW2d 455 (2002). Application of the material breach doctrine to this case is consistent with these bedrock principles of equity.

Majestic argues that *Walker* and the other cases discussed above, in which this Court and the Court of Appeals applied the material breach doctrine, do not apply for the reason that those cases involved lease recision claims – not lease forfeiture claims. The Court of Appeals did not discuss *Walker* and its progeny presumably for that very reason. However, while the distinction is true, it merely begs the question – is the distinction an appropriate basis

upon which to limit the application of the material breach doctrine under Michigan common law? – particularly where:

1. both claims (recision and forfeiture) are equitable claims, subject to equitable relief;
2. both claims, if granted, result in a complete abrogation of the terms of the lease; and
3. if equity applies to temper the effects of the less harsh remedy of recision (which requires restitution), then why not the harsher remedy of forfeiture (which does not require restitution)?

Neither Majestic nor the Court of Appeals have provided answers to these questions. Majestic has cited no case in which any Michigan court has considered, and rejected, the material breach doctrine at all, much less based on the assertion of a forfeiture claim as opposed to a recision claim. Instead, Majestic's case law merely supports the legal position that contracts may be forfeited when they are breached. See, for example, *Campbell v Homer Ore Co*, 309 Mich 693; 16 NW2d 125 (1944), and *White v Huber Drug Co*, 190 Mich 212; 157 NW 60 (1916). This Court, however, has continually and repeatedly found against forfeitures.

> 'Equity dislikes forfeitures, and not only will not aid in enforcing them, but will restrict their effect as far as possible.' *Hull v Hostettler,* 224 Mich 365, 194 NW 996, 997.
>
> 'The law does not favor forfeitures, and he who plants himself upon a forfeiture must look well to where he stands.' *Zadigian v Gard,* 223 Mich 147, 193 NW 783, 785.

> 'The law does not favor forfeitures, and even though the alleged breaches upon which defendant Sanitarium bases its claim to avoid this lease, actually are technical violations of the strict terms of the lease, they are not such violations as would justify a court of equity in declaring what will amount to a forfeiture of plaintiff's rights.' *Aniba v Burleson Sanitarium,* 229 Mich 118, 200 NW 984, 986.
>
> 'Forfeitures are in their nature penalties, or pecuniary punishment, not favored either in law or equity.' *Bonham v National Insurance Co,* 230 Mich 349, 202 NW 995, 996.
>
> 'A forfeiture is not favored either at law or in equity, and a provision for it in a contract will be strictly construed, and courts will find a waiver upon slight evidence, when the equity of the claim made, . . . is, under the contract, in favor of the insured.' *Smith v IOF,* 245 Mich 128, 222 NW 166, 167.

Keyworth v Wiechers, 273 Mich 347, 372-373; 263 NW 57 (1934).

Amicus Curiae submits that the material breach doctrine may logically be applied equally to both recision and forfeiture claims. That is, the common law of this State, which is at all times, "a work in progress," may allow for the application of the material breach doctrine to cases requesting recision and forfeiture. *Price v High Pointe Oil Co, Inc,* 493 Mich 238, 243; 828 NW2d 660 (2013). In either case, the effect of granting the requested remedy is to eradicate the contract. In either case, the equitable relief and defenses are available equally to both parties to the contract. And, in either case, to a certain degree, equitable principles are being imposed upon the written terms of the contract; that is, the remedy of recision itself is imposed upon the written terms of the contract since it is available to litigants notwithstanding the absence of a specific, written contractual provision granting the parties that defense. Similarly, the defense of material breach can be made available to Michigan litigants

notwithstanding the absence of a specific, written contractual provision granting the parties that defense. This result is consistent with existing common law and the policy of this State that equity abhors a forfeiture.

C. The Court Of Appeals Has Previously Applied The Material Breach Doctrine To A Forfeiture Claim

The Michigan Court of Appeals has already "put a toe in the water" on this issue by applying the material breach doctrine in the face of a forfeiture provision and in the context of both breach of contract claims for money damages, recision and forfeiture. *See*, for example, *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577; 739 NW2d 696 (2007), and *Consoer Townsend Envirodyne Engineering, Inc v City of Grand Rapids*, unpublished opinion per curium of the Court of Appeals issued September 22, 2009 (Docket No. 283563), 2009 WL 3013258 (Mich App, 9/22/09) Exhibit D, in which the Court of Appeals held that plaintiffs' breach of contract action for money damages was barred by its material breach of the contract. *See also, Geno Enterprises, Inc v Newstar Energy USA, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No. 232777), 2003 WL 21299926 (Mich App, 6/5/03) (Before: Smolenski, P.J. and White and Wilder, J.J.), Exhibit E, discussed infra.

For example, in *Geno Enterprises*, the tenant had entered into a lease to drill a gas well under Saginaw Bay. The lease was for an initial term of 36 months and "as long thereafter as oil and/or gas are being produced or capable of being produced in paying quantities . . . ." Newstar Energy USA Inc. ("Newstar") was the successor-in-interest to the original tenant, Jeffrey A. Foote. In 1995, Foote had a gas well drilled to a bottom hole under

Saginaw Bay. The property owner received royalty checks from Newstar until January 1999, totaling approximately $302,000. Around January 1999, one of Newstar's royalty checks bounced due to insufficient funds. The property owner then claimed that Newstar was in breach of the lease. The owner also claimed that Newstar was in breach of three other provisions of the lease. One of these provisions included providing all seismic data pertaining to the drilling of the well in 1995. While Newstar could cure all of the other alleged defaults, it had not originally drilled the well and, therefore, could not timely obtain the seismic data. The owner, Geno Enterprises, Inc., declared a forfeiture and commenced a summary proceeding in the district court under MCL 600.5701 *et seq.* Geno Enterprises, like Majestic in this case, sought to take possession of a substantial asset (the gas well), based upon a nonmaterial default under the lease. The district court determined that Newstar's breach was not a material breach warranting a termination of the lease, stating:

> In considering all of the above, this Court finds that the Defendant's breach was not a material breach warranting a termination. The Defendant has performed all of its other duties under the lease, including paying the Plaintiff sums due under the lease. The Court is very reluctant to refrain from enforcing the specific terms of the lease but believes that the Plaintiff has suffered little damage, has had substantial performance, and is trying to use a relatively minor and negligent violation of the lease to terminate it.

Geno Enterprises, supra, at p 6.

The district court thereafter refused to terminate the lease and provided Newstar with a period of time to obtain the seismic data and cure the breach. The decision by the

district court was affirmed by both the circuit court and the Court of Appeals. The Court of Appeals stated:

> There is no Michigan precedent compelling a court to automatically declare a forfeiture under a contract provision without looking to the equity of the situation. See 49 Am Jur 2d, Landlord and Tenant, § 339, "Equitable Relief From Forfeiture," which states in pertinent part:
>
> > Forfeitures are not favored in equity, and unless the penalty is fairly proportionate to the damages suffered by reason of the breach, relief will be granted against a forfeiture where the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred. Thus, equitable relief against forfeiture of a lease is generally granted in all cases of nonpayment of rent if such payment is delinquently made or tendered, unless there is some ground for denying such relief, and relief against forfeiture of a lease is generally granted in cases other than those for nonpayment of rent, where the grounds for relief are fraud, accident, or mistake. *Likewise, a lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result, or to prevent an unconscionable advantage to the lessor . . . This is particularly true where the breach is of a covenant of minor importance,* as, for example, where a tenant's default under the lease is a technical one and the tenant has duly paid rent and taxes on the property over a long period of time, has substantially complied with the other lease obligations, and offers promptly to cure the default.

Geno Enterprises, supra, at pp 7-8 (emphasis in original). The Court of Appeals found that "[t]here was evidence that Newstar had a substantial investment in the property, had otherwise

complied with the lease, and that [the owner] could be made whole." On this basis, the Court affirmed the decisions of the district and circuit courts[2].

D. Applying The Material Breach Doctrine To Commercial Lease Forfeiture Claims Is Consistent With The Many Areas Of Michigan Common Law On Contracts In Which Equitable Principles Are Applied To Avoid Underlying Harsh Results

Michigan law is replete with doctrines in the common law of contracts designed to avoid underlying harsh results by applying equitable principles. For example, as noted in *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972), a party who first breaches a contract cannot sue the other part for breach of contract. "However, that rule only applies when the initial breach is substantial." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). This Court has stated that a substantial breach:

> can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [*McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted).

And, as discussed by the district court and then quoted by the Court of Appeals in *Geno Enterprises:*

> Many cases dealing with the "material breach" issue can be found in the law of contract as it applies to the remedy of recission [sic

---

[2] Amicus Curiae fully recognizes and appreciates the non-precedential nature of an unpublished decision of the Court of Appeals. However, because the *Geno Enterprises* case is on point with the facts and issues here, and was relied upon by the circuit court for its grant of summary disposition in favor of LWCC, Amicus Curiae submits that failure to discuss the *Geno Enterprises* case would present a less than complete discussion of the relevant law.

> rescission] which is similar to the contractual remedy of termination. Many Michigan cases holding the applicability of the "no material breach" or "substantial performance" equitable defense to contract recission [sic] may be found in West's Michigan Digest Contracts 95K261(2) (see *Omnicom of Michigan v Giannetti Inv Co*, 561 NW2d 138, 221 Mich App 341, 1997). This doctrine exists to avoid harsh results when a contract has been substantially performed, the aggrieved party has received most of the agreed upon benefits, and the aggrieved party has other remedies available.
>
> Another example of the law of contract that seeks to avoid harsh results is the doctrine holding that agreed upon damage provisions, liquidated damages, in a contract are unenforceable where they are excessive and do not reasonably relate to damages that are likely to occur. Another example where the law of contract avoids a recission [sic] or breach of contract is the "time is of the essence doctrine," which states unless it is otherwise specified, late performance within a reasonable time is not grounds for a recission [sic] (see also MCL 440.616). A final example of the law seeking to avoid harsh results is found in the land contract forfeiture provisions. MCL 600.5726 expressly requires a "material breach" before a forfeiture may be declared.

Geno Enterprises, supra, at p 6. *See also*, MCL 554.46 which requires a material breach for a forfeiture of lands:

> When any conditions annexed to a grant or conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

MCL 554.46. In short, many areas of Michigan contract law use equity to avoid unduly oppressive results. No cogent reason is provided by Majestic as to why equitable relief from forfeiture of a commercial lease should differ. To the contrary, applying the material breach doctrine to the forfeiture of commercial leases in a logical and natural extension of existing

Michigan common law, consistent with the other areas of the common law on contracts and consistent with the public policy of this State.

E. The Case Law Of Other States Supports Application Of The Material Breach Doctrine In Lease Forfeiture Cases

The Restatement of Contracts, First and Second, has provided the authority for the application of the material breach doctrine, not only in Michigan, but in many other states as well. For example, in *Kiriakides v United Artists Communications, Inc*, 312 SC 271; 440 SE2d 364 (1994), the trial court denied forfeiture of a lease and ejectment on equitable grounds. On appeal, the landlord argued that the terms of the parties' lease and the applicable South Carolina statute did not permit equitable considerations and, instead, required that forfeiture be granted even where the alleged breach was not material. Similar to the Lease at issue here, the *Kiriakides* lease provided:

> If the Lessee . . . fail[s] to make any payment of any installment of rent or other sum required to be paid by the lessee . . . and if such default shall not be cured . . . within ten (10) days after written notice of such failure to make payment . . . the Lessor shall have the right at its election, then or at any time thereafter while such default or defaults shall continue, after Lessee's failure to cure such default or defaults as provided in this paragraph, to give the Lessee notice of the Lessor's intention to terminate this lease and all rights and privileges granted the Lessee hereunder, on a date specified in such notice. . . . In the event of termination of this lease as in this Paragraph provided, the Lessor shall have the right to repossess the leased premises and the improvements . . . .

Kiriakides, 440 SE2d at 366. And, similar to Michigan's Summary Proceedings Act, South Carolina statutory law provides:

> [t]he tenant may be ejected upon application of the landlord or his agent when (a) such tenant fails or refuses to pay the rent when

> due or when demanded, (b) the term of tenancy or occupancy has ended or (c) the terms or conditions of the lease have been violated.

Kiriakides, 440 SE2d at 366, citing SC Code §27-37-10 (1991).

The South Carolina Supreme Court affirmed the decision of the trial court, holding that "forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced." *Kiriakides*, 440 SE2d at 366. In doing so, the court overruled prior Supreme Court cases in which the materiality of the breach of a lease had not been considered a valid defense. *Kiriakides*, 440 SE2d at 366, n 3. The court then adopted the standards set forth in the Restatement (Second) of Contracts, §241 (1981) "for determining whether the breach of a commercial lease is trivial or immaterial." *Kiriakides*, 466 SE2d at 366-367. The court explained:

> A majority of courts have concluded that a lease may not be forfeited for a trivial or technical breach even when the parties have specifically agreed that "any breach" gives rise to the right of termination. *See Foundation Dev Corp v Loehmann's, Inc*, 163 Ariz 438, 445, 788 P2d 1189, 1196 (1990). These courts note the sophistication and complexity of most business interactions and are concerned that the possibilities for breach of a modern commercial lease are virtually limitless. In their view, the parties to the lease did not intend that every minor or technical failure to adhere to complicated lease provisions could cause forfeiture. Therefore, the majority of courts hold that to justify forfeiture, the breach must be material, serious, or substantial. *Id*.
>
> [4][5][6] Landlord's interpretation of section 27-37-10 would lead to the absurd result that leases could be terminated for immaterial and trivial breaches. In our view, the Legislature enacted section 27-37-10 to give the lessor a right not recognized at common law, the right to terminate a lease in the absence of a contractual provision. We do not find, however, that the Legislature intended

> this right to be unlimited. Therefore, we adopt the majority rule that the landlord's right to terminate is not unlimited and that the court's decision to permit termination must be tempered by notions of equity and common sense. *Id.* 163 Ariz at 446, 788 P2d at 1197. Accordingly, we hold that a forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced.

Kiriakides, 440 SE2d at 366.

Similarly, in *Foundation Development Corp v Lohmann's, Inc*, 163 Ariz 438; 788 P2d 1189 (1990), the case relied on by the South Carolina Supreme Court, the Arizona Supreme Court also adopted the framework contained in the Restatement (Second) of Contracts, §241 for determining whether to enforce forfeiture. *Foundation Dev*, 788 P2d at 1197-1198. There, the lease contained a forfeiture provision similar to the one at issue here. *Foundation Dev*, 788 P2d at 1190-1191. And, Arizona law provided for forfeiture by statute – even in the absence of a contractual forfeiture provision. *Foundation Dev*, 788 P2d at 1193-1194. The court acknowledged the right of the landlord "to enforce his contract according to its express terms," quoting its prior decision in which it stated:

> In *Karam* we stated . . . when a tenant "violates any of the covenants of the lease, and it is provided that such a violation shall cause a forfeiture of his lease, the courts will enforce such forfeiture."

Foundation Dev, 788 P2d 1195. Nonetheless, relying on authority from other state courts, the Arizona Supreme Court adopted the material breach doctrine, stating:

> Moreover, an overwhelming majority of courts has concluded, without reference to a specific statutory provision, that a lease may not be forfeited for a trivial or technical breach even where the parties have specifically agreed that "any breach" gives rise to the right of termination. See Annotation, *Commercial Leases:*

> *Application of Rule That Lease May Be Canceled Only For "Material" Breach*, 54 ALR 4th 595 (1987). These courts note the sophistication and complexity of most business interactions and are concerned, therefore, that the possibilities for breach of a modern commercial lease are virtually limitless. In their view, the parties to the lease did not intend that every minor or technical failure to adhere to complicated lease provisions could cause forfeiture. Accordingly, nearly all courts hold that, regardless of the language of the lease, to justify forfeiture, the breach must be "material," "serious," or "substantial." Thus, well reasoned authority from other states also refutes the arguments advanced by the landlord in this case.
>
> **Having been squarely presented with the question for the first time, we decline to hold that any breach, no matter how trivial or insignificant, can justify a forfeiture.** Nor do we believe such a rule could long survive. Trivial or not, the delay in paying the rent here was at most three days. What if the breach had been three hours instead of three days or the check had been lost in the mail and came at three minutes after midnight? The questions almost answer themselves. **Therefore, we now join the overwhelming majority of jurisdictions that hold the landlord's right to terminate is not unlimited. We believe a court's decision to permit termination must be tempered by notions of equity and common sense. We thus hold a forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced.**

Foundation Dev, 788 P2d at 1196-1197 (emphasis supplied; footnotes omitted). *See also, Maleki v Desert Palms Professional Properties, LLC*, 222 Ariz 327; 214 P2d 415 (2009) (a tenant's right to possession may not be conditioned on perfect performance of a commercial lease, but may be forfeited only upon a material breach).

California also follows the Restatement (Second) of Contracts on the issue of commercial lease forfeiture. *See*, for example, *Superior Motels, Inc v Rinn Motor Hotels, Inc*, 195 Cal App 3d 1032; 241 Cal Rptr 487 (1988) ("Following the lead of the Restatement of

Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.'") Quoting Justice Benjamin Cardoza, the California Court of Appeals stated:

> Cardoza had occasion to examine the distinction between material and inconsequential breaches in his landmark decision regarding substantial performance of a construction contract. "The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture." (*Jacobs & Youngs v Kent*, (1921) 230 NY 239, 241, 129 NE 889.) "Where the line is to be drawn between the important and the trivial cannot be settled by a formula. 'In the nature of the case precise boundaries are impossible' (2 Williston on Contracts, sec. 841). The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract . . . . The question is one of degree, to be answered, if there is a doubt, by the triers of the facts . . . . We must weigh the purposes to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence . . . . [T]he law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture." (*Id* at pp 243-244, 129 NW 889).

Superior Motels, 195 Cal App 3d at 1051.

The courts of the State of Indiana have also followed the Restatement as an aid to determining materiality in the context of lease forfeiture claims. *See, Page Two, Inc v PC Management, Inc,* 517 NE2d 103, 107 (1987); citing *Goff v Graham,* 159 Ind App 324; 306 NE2d 758 (1974), adopting the Restatement (First) of Contracts, §275 and *Collins v*

McKinney, 871 NE2d 363, 375 (2007), citing *Frazier v Mellowitz,* 804 NE2d 796 (2004), adopting the Restatement (Second) of Contracts, §241. Therefore, in Indiana, an express provision in a lease that allows for forfeiture upon breach of the lease is enforced only if the breach was material. *Id.*

Massachusetts too follows the Restatement (Second) of Contracts and applies the equitable considerations of §241 to determine if a breach of lease is sufficiently "significant" to warrant a forfeiture. In Massachusetts, a default/forfeiture clause in a lease is, in most cases, deemed controlling. *DiBella v Fiumara,* 63 Mass App Ct 640; 828 NE2d 534, 539 (2005). However, because the policy of the State of Massachusetts is to "not look with favor upon penalties and forfeitures," the mere existence of a default/forfeiture clause does not preclude the Massachusetts courts from awarding the tenant equitable relief against forfeiture where the breach, "while not insignificant, is also not material (that is, it is not a breach of an 'essential and inducing feature' of the agreement, *see, e.g., Bucholz v Green Bros, Co,* 272 Mass at 52, 172 NE 101." *Id.* The *DiBella* Court summarized the historical application of the Restatement factors by Massachusetts courts:

> . . . the factors set forth in §241 are viewed as significant in our landlord-tenant cases, especially where a party seeks relief from forfeiture. Our courts will consider the extent to which the injured party will be deprived of benefit, whether that party will suffer loss, and the extent to which the party failing to perform will suffer forfeiture. See *Lundin v Schoeffel,* 167 Mas 465, 468-470, 45 NE 933 (1897). They will look to whether "on the whole it is just and right" that relief from forfeiture of the lease should be granted. *Id.* at 469, 45 NE 933. They will also consider whether the injured party can be adequately compensated, or has changed its position. *Paeff v Hawkins-Washington Realty Co,* 320 Mass 144, 148, 67 NE2d 900 (1946).

DiBella, 828 NE2d at 540, n 7.[3]

In sum, the Restatement (Second) of Contracts, §241 is followed by many states in commercial lease cases in order to provide the means for equitable outcomes in forfeiture cases. These jurisdictions do so notwithstanding the presence of an express and unambiguous forfeiture clause in the lease. As noted by the South Carolina Supreme Court and the Arizona Supreme Court:

> [A]n overwhelming majority of courts has concluded, without reference to a specific statutory provision, that a lease may not be forfeited for a trivial or technical breach even where the parties have specifically agreed that "any breach" gives rise to the right of termination. *See* Annotation, *Commercial Leases: Application of Rule That Lease May Be Canceled Only For "Material" Breach,* 54 ALR 4th 595 (1987).

Foundation Dev, 788 P2d at 1196. And, as discussed by Justice Cardoza:

> We must weigh the purposes to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence . . . . [T]he law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture.

Superior Models, 195 Cal App 3d at 1051.

Accordingly, as shown by the cases discussed above, commercial leases may be enforced as written, but with application of the legal and equitable doctrine and defenses which

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[3] *See also, VND, LLC v Leevers Foods, Inc,* 672 NW2d 445, 449 (North Dakota, 2004), citing Restatement (Second) of Contracts, §241 (1977) (In a summary eviction action, the right to possession depends on whether or not the tenant failed to pay rent and whether or not there were any "material breaches." Thus, evidence of the "strained" relationship between the parties was relevant and important in determining whether a material breach had occurred).

allow for fair and just results – including the material breach doctrine. The law of Michigan "abhors forfeitures." *Smith,* 245 Mich at 134. The law of Michigan includes the material breach doctrine. *Walker,* 347 Mich at 635. Yet, to date, save the Court of Appeals decision in *Ceno Enterprises,* the common law of Michigan has seemingly failed to put the two together – disfavored forfeiture and material breach doctrine. This case presents an opportunity for this Court to do so.

F. All Equitable Factors Weigh In Favor Of Reversing The Court of Appeals and Upholding The Circuit Court's Refusal To Terminate The Lease

The Circuit Court reviewed the Restatement (First) of Contracts factors adopted by this Court in *Walker and* found them to weigh in favor of no material breach. Amicus Curiae submits that the Circuit Court was correct in its conclusion.

The extent to which Majestic will obtain the substantial benefit it could have reasonably anticipated – At the time it declared a breach, Majestic had received 16 years of rent monies in excess of $1.6 million. Majestic had also received, in full, its contracted for benefit from the Lease of LWCC's payment of the full cost for the development of the Golf Facility – the presence of which would only serve to increase and enhance the value of its proposed residential development. As found by the Circuit Court, Majestic obtained "the benefit it reasonably expected to receive."

The extent to which the injured party may be adequately compensated in damages – Any alleged, but unproven, delay caused to Majestic's residential development by LWCC's alleged untimely execution of the Easement Agreement has been cured and/or could

be compensated through money damages – if, in fact, Majestic has even suffered any damage. Yet, Majestic has never requested money damages.

The extent to which the party failing to perform has already performed – It is undisputed that LWCC was never in default under the terms of the Lease during the entire 16-year leasehold period preceding this lawsuit. It is also undisputed that LWCC invested $6,000,000 to develop the Golf Facility and has timely paid Majestic in excess of $1.6 million in rent.

The greater or less hardship on the party failing to perform in terminating the contract – Likewise, the comparative hardship to LWCC if the Lease is terminated to that of Majestic if the Lease is not terminated weighs heavily in LWCC's favor. Eviction would leave LWCC with no golf course to operate and most certainly put it out of business, notwithstanding having paid $6 million to build the Golf Facility. At the same time, Majestic would receive a huge windfall – a fully constructed and fully operational Golf Facility. By contrast, Majestic has received the benefits of its bargain under the Lease and would merely maintain its status quo if the Lease is *not* terminated. The material breach doctrine is designed to avoid just this kind of unfair result.

The willful, negligent or innocent behavior of the party failing to perform – Further, LWCC's breach was not willful. As noted by the Circuit Court:

> In October 2006, the plaintiff presented the defendant with its first easement request, noting that it was a significant request and an "essential part" of their plan. **Two years later**, on October 2008, the plaintiff provided notice that the defendant's obligation to provide this easement was outstanding and that it sought immediate compliance. Allegedly over a [sic]

> misunderstanding as to when this performance became due, the defendant did not comply, and the plaintiff sent a letter of termination on November 24, 2008.

Tr Ct Op, 12/23/09, p 7-8, Exhibit A (emphasis supplied). Quite simply, Majestic's sporadic requests for the Easement Agreement, combined with its express or implicit agreement to make the Easement Agreement part of the merger negotiations demonstrates the lack of willfulness on the part of LWCC. And, LWCC's assertion that its actions were inadvertent and/or accidental are undisputed.

The greater or less uncertainty that the party failing to perform will perform the remainder of the contract – Finally, that LWCC will perform the remainder of the Lease is evidenced by its zealous and arduous defense of this case, its attempt to exercise its Option, and its execution of the Easement Agreement. This, like the other five factors, weighs in favor of LWCC.

In sum, "[a] technical but immaterial breach is insufficient for recovering possession." *Michigan Lease Drafting and Landlord-Tenant Law*, §4.8, 4-9 (2009). Here, after 16 years of LWCC's complete compliance with its obligations under the terms of the Lease, including constructing a Golf Facility and paying all rent, property taxes, etc., LWCC allegedly failed to timely execute the Easement Agreement – but at a time when no development to the property contiguous to the Golf Facility was occurring that would require the Easement Agreement. Majestic should not be awarded ownership of the Golf Facility for an alleged failure by LWCC to timely consent to the Easement Agreement under the facts of this case.

IV. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, Michigan Golf Course Owners Association respectfully requests that this Honorable Court grant the Association's Motion for Leave to File Amicus Brief and reverse the Opinion of the Court of Appeals.

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Date: July 18, 2013

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EXHIBIT LIST FOR
MICHIGAN GOLF COURSE OWNERS ASSOCIATION'S
AMICUS CURIAE BRIEF IN SUPPORT OF THE POSITION ON APPEAL OF
DEFENDANT/COUNTER-PLAINTIFF/APPELLANT,
LAKE WALDEN COUNTRY CLUB, INC.

A. 12/23/09 Trial Court Opinion

B. 3/30/10 Trial Court Opinion on Reconsideration

C. Court of Appeals Opinion

D. *Consoer* Opinion

E. *Geno Enterprises* Opinion

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A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

MAJESTIC GOLF, LLC,
Plaintiff,

v.

Case No. 09-24146-CZ
Hon. Michael P. Hatty

LAKE WALDEN COUNTRY CLUB, INC.,
Defendant.
_____/

OPINION AND ORDER

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 23 day of December, 2009.

This action involves the alleged breach of a lease between the parties concerning the 27-hole, approximately 342-acre "Majestic at Lake Walden" golf course in Hartland Township. The defendant, Lake Walden Country Club ["LWCC"], is the tenant on 27 tee-to-fairway-to-green islands of land interconnected by easements across the plaintiff Majestic Golf, LLC's ["Majestic"] other land. The plaintiff alleges that the defendant breached the parties' lease by failing to execute a road crossing easement in favor of the plaintiff per the lease whereby the plaintiff would put road crossings and drainage or utility easements at mutually convenient locations for residential home developments surrounding the golf course. The plaintiff argues that this failure resulted in the termination of the lease and extinguished the defendant's option to purchase the property. The defendant has responded that it had not received formal notice of default under ¶ 26 of lease when it gave notice of its intent to exercise the option to buy under ¶ 17 and that it is entitled to buy the leased property for the property's fair market value, as determined by the appraisal process described in the lease.

The parties had been involved in merger negotiations to provide the plaintiff with an ownership interest in the defendant's corporation in exchange for legal title to the property since 2003. The negotiations fell apart on or around December 22, 2008, concurrent with the events giving rise to the filing of this complaint. The parties stipulated to an order for a preliminary injunction, which was entered on February 18, 2009 staying the appraisal process outlined in the lease. By stipulation dated June 5, the plaintiff filed a First Amended Complaint. Thereafter, the defendant answered and filed a counterclaim on June 26 asserting a count for specific performance to allow the option to purchase to go forward and a declaratory and quiet title count to remove certain restrictions recorded allegedly unilaterally by the plaintiff contrary to the lease. The defendant moved for summary disposition on August 27, and the plaintiff filed a counter motion for summary disposition on September 24. After one adjournment, this Court heard those motions on December 3.

The defendant's motion for summary disposition is brought under MCR 2.116(C)(8) & (10). The plaintiff's counter motion does not state which rule it moves under, so it is assumed that it moves under MCR 2.116(C)(10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant, and judgment may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* By comparison, a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* The reviewing court may

consider the substantively admissible evidence actually proffered in opposition to the motion. A mere promise to provide admissible evidence raising a genuine issue of fact is insufficient to avoid summary disposition. *Id.* Additionally, under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment for the opposing party." *Marx v Department of Commerce*, 220 Mich App 66, 70 (1996).

The parties' cross motions for summary disposition present three primary issues. The first issue is whether or not LWCC defaulted on the lease after receiving notice of non-compliance with an obligation and an opportunity to cure that non-compliance via the Crouse letter on October 7, 2008. The second is whether, if LWCC defaulted, such default warranted termination of the lease and, by extension, termination of their option to purchase the subject property. The final issue is whether, if LWCC did properly invoke its option, either or both of the appraisals should be stricken by the Court as failing to comply with the appraisal procedures defined by ¶ 17(D) of the lease.

As to the first issue, it is readily apparent that there was a default as defined by the terms of the lease. Generally, unambiguous contracts must be enforced as written. *Bloomfield Estates Improvement Ass'n v City of Birmingham*, 479 Mich 206, 212 (2007). Paragraph 26 of the lease unambiguously states:

> "Each of the following events shall be a default hereunder by Tenant and a breach of this Lease... (D) If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be

made by specific provision of this lease, or if no period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant..."

The plaintiff alleges that the defendant breached the lease by failing to comply with ¶ 22 after withholding its consent to a requested easement. The plaintiff further states that it provided the defendant with notice of non-compliance in an October 7, 2008 letter from Frank Crouse demanding that LWCC fulfill its obligation to provide Majestic with certain easements under the lease and giving 30 days to do so. The defendant responds that the letter gave no such notice as the notice did not refer to a default or call itself a notice. Moreover, the parties were in merger negotiations and had the understanding that consent to the easement need not be provided until closing of the merger. Finally, the defendant argues that the adequacy of notice must be considered in the context of an e-mail from Crouse expressing a desire to continue to negotiate the merger.

The October 7 letter provides the requisite notice under ¶ 26. *See* Exhibit G to Defendant's Motion for Summary Disposition. The letter makes a definite request for consent to the easement, references the defendant's obligation under ¶ 22 of the lease, and recites the history of the request demonstrating that performance on this obligation is outstanding. Finally, the letter concludes by reiterating the request that LWCC "fulfill its obligation under the lease" and provides a time period of 30 days to do so. Paragraph 22 obligates the tenant to "permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate." The defendant had long known of the plaintiff's desire for this easement and had promised its consent ten months prior to this notice. Accordingly, LWCC had failed to perform one of the "agreements, terms, covenants, or conditions" of the lease and Majestic provided the requisite notice by

communicating that this was an outstanding obligation and requesting that the obligation be fulfilled within 30 days. LWCC did not comply with its obligation and therefore technically breached the lease.

It is inconsequential that the October 7 letter did not call itself notice or reference an existing default. As the plaintiff argues, a default did not exist until after 30 days of non-performance following the transmission of this letter. Further, the terms of the lease do not require that the notice label itself as such but require only that the landlord inform the tenant that it has not performed an obligation under the lease, which this letter did. The October 8 e-mail from Crouse to Pat Hayes and James Hile does not contextualize away the sufficiency of this notice either but rather bolsters it. Although Crouse does express a desire to continue the negotiations, he also recites in the e-mail the defendant had not fulfilled its obligation under ¶ 22 of the lease and reiterates his request that the defendant do so. Finally, the allegation that the parties had agreed to another period for performance of this consent to easement is similarly immaterial. The obligation to permit easements is stated in mandatory language, and the time of performance is only contingent upon a mutually agreeable location being chosen. The lease itself under ¶ 43 limits modification of its terms by requiring a written instrument executed by both parties. Therefore, what the parties agreed orally as to when performance would occur was irrelevant since the plaintiff had a right to demand performance under the lease.

Since a breach occurred, the next issue is whether the breach was material and permitted termination of the lease and by consequence the defendant's option to purchase the property. The language of ¶ 26 of the contract states that "[i]f any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the

right, title and interest of Tenant hereunder." A breach, as specified in the preceding language of that paragraph, occurred as already noted.

Despite the termination and forfeiture provision in the contract, the defendant urges the Court to take into account equitable considerations and find that the breach was not material since the defendant had substantially complied with the lease by consistently paying rent on time for the preceding 16 years and had invested $6,000,000 into the development of the property. The defendant cites to *Geno Enterprises Inc v Newstar Energy USA, Inc* and proposes that prior to declaring a forfeiture under a general clause such as the one at issue, courts are instructed first to look into the equity of the situation and determine whether the claimed breach is material. *Geno Enterprises Inc v Newstar Energy USA, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 5, 2003 (Docket No 232777). In *Geno*, the Court of Appeals upheld a district court decision applying the defense of material breach to a commercial lease situation and deciding that the breach at issue was not significantly material to warrant termination and forfeiture. *Id.* at 6. The Court quoted approvingly from 49 Am Jur 2d § 339, which noted that "*a lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through the intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result...*" *Id.* (emphasis in original).

The decision in *Geno* is consistent with the general rule across the country that disfavors the termination of leases and holds that "in the absence of willful and culpable neglect on the part of a lessee, a forfeiture will not be decreed for a failure to comply with the covenants of a lease..." 49 Am Jur 2d Landlord and Tenant § 236 (2009). In accordance with this rule, the Ohio appellate courts have determined that:

> [e]ven when [a forfeiture or termination] provision is incorporated into the lease, equitable considerations may weigh against concluding that a lessee's conduct should result in forfeiture of a leasehold interest. 'When a party raises an equitable defense, it is the responsibility of the court to weigh the equitable considerations before imposing a forfeiture.' The responsibility exists even when, as here, a party is in default of the lease.

Takis, LLC v CD Morelock Properties, Inc, 180 Ohio App3d 243, 250-251 (2008).

This principle is generally affirmed nationwide. *See, e.g., Foundation Development Corp v Loehmann's, Inc*, 163 Ariz 438 (1990); *Collins v McKinney*, 871 NE2d 363 (Ind App, 2007); *Johnny's, Inc v Njaka*, 450 NW2d 166, 168 (Minn App,1990).

The principle discussed in *Geno* and the foreign authorities cited above is applicable to this case, and the relative immateriality of the breach at issue at issue does not warrant a termination of the lease and forfeiture. The considerations in determining whether a breach of a contract is material include whether the non-breaching party obtained the benefit it reasonably expected to receive, the extent to which the non-breaching party may be adequately compensated for damages for lack of complete performance, the comparative hardship on the breaching party in terminating the contract, the willfulness of the breaching party's conduct, and the level of uncertainty concerning whether the breaching party will perform the remainder of the contract. *Omnicom of Michigan v Gianetti Inv Co*, 221 Mich App 341, 348 (1997).

In this case, the parties entered a 25-year lease for this property in December 1992. In October 2006, the plaintiff presented the defendant with its first easement request, noting that it was a significant request and an "essential part" of their plan. Two years later, in October 2008, the plaintiff provided notice that the defendant's obligation to provide this easement was outstanding and that it sought immediate compliance. Allegedly over misunderstanding as to

when this performance became due, the defendant did not comply, and the plaintiff sent a letter of termination on November 24, 2008. Over the 16 years prior to this incident, the defendant had always paid its rent timely. Additionally, the defendant had invested $6,000,000 in developing the property. The plaintiff's primary benefits from the parties' bargain were the substantial income from rent over the 25-year period and the increase in value to the surrounding property that he wished to develop residentially by the defendant's development of a golf course facility and cooperation with further development. The first benefit was obtained in whole up to the time the plaintiff gave its notice of termination. The second, while impaired partly by the defendant's non-compliance with plaintiff's request, has been obtained in large part since the defendant has invested $6 million in the development of the property. Moreover, to the extent that the plaintiff's right to a benefit has been impaired by the defendant's withholding its consent to the requested easement, it can still be obtained. Any impairment in value that occurred by the defendant's withholding the easement over the past year is compensable in monetary damages. Considering the extent of the defendant's $6 million investment in the property and the concern that eviction would effectively put the defendant out of business as it would have no golf course to operate, the hardship caused to the defendant by termination would be substantial. It is uncertain whether the defendant's breach was willful. Finally, taking into account the defendant's past performance in paying the rent, the likelihood that LWCC will continue to pay rent on a timely basis is high. Overall, the factors weigh heavily in favor of avoiding the termination and forfeiture and continuing the lease to its full term since the defendant's breach was not material and the intervention of equity is necessary to prevent the unduly harsh and oppressive result that termination and forfeiture would work in these circumstances.

Lastly, the Court is asked to decide whether the option was validly invoked and, if so, whether the appraisals conducted have complied with the appraisal process described in ¶ 17(D) of the lease. The Court need not decide the latter issue since the option was not validly invoked. Although the plaintiff's termination of the lease was illegitimate since the breach was immaterial, the lease provides in ¶ 17(C) that "[t]he option may be exercised only if Tenant is not in default of this Lease at the time of exercise." As of November 24, 2008, the defendant was in default on the lease. The defendant has not cured that default, and its provision of the revised draft of the easement on December 11 was not sufficient to cure as LWCC still did not provide its consent to the easement. Accordingly, the option was not validly invoked, and the question of whether the appraisals were properly conducted is not ripe for decision by this Court.

In conclusion, the Court finds that the defendant defaulted on the lease after receiving the requisite notice from the plaintiff pursuant to ¶ 26 of the lease agreement. However, under the legal principles approved by *Geno* and other persuasive authority, the Court finds that termination and forfeiture are inappropriate remedies. The breach of the lease in this instance was not sufficiently material to warrant termination of the lease. Nonetheless, because the lease provides in ¶ 17(C) that "[t]he option may be exercised only if Tenant is not in default of this Lease at the time of exercise" and the defendant was in default as of November 24, 2008, the Court finds that the defendant's attempt to exercise the option was ineffective. Thus, the Court abstains from ruling on the propriety of the parties' appraisals.

In accordance with the above observations:

1. As to Count I of the plaintiff's complaint seeking an order that the defendant surrender the lease premises, the defendant's motion for summary disposition is GRANTED.

Because there is no genuine issue of material fact and the defendant's breach was not material, the plaintiff cannot succeed on that claim.

2. With respect to Count II of the plaintiff's complaint, the plaintiff's motion for summary disposition is GRANTED in part since the defendant's attempt to exercise their option to purchase was ineffective as a result of the defendant's default. However, because the defendant's breach was not material, the option has not indefinitely lapsed.

3. Consistent with this ruling, summary disposition is GRANTED in favor of defendant as to Count V of the plaintiff's complaint and in favor of plaintiff as to Count I of the defendant's counter-complaint.

4. Finally, with respect to Counts III and IV of the plaintiff's complaint, the defendant's motion is DENIED. Count III was previously disposed of by the Court in issuing a preliminary injunction, and Count IV is not germane to the instant motion.

This action will continue solely for the sake of deciding on a reasonable rental value of the property under Count IV of the plaintiff's complaint.

IT IS SO ORDERED.

Michael P. Hatty
Circuit Court Judge 12-23-09

B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

MAJESTIC GOLF, LLC,
Plaintiff,

v.

Case No. 09-24146-CZ
Hon. Michael P. Hatty

LAKE WALDEN COUNTRY CLUB, INC.,
Defendant.
_____/

OPINION AND ORDER ON RECONSIDERATION

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 26 day of March, 2010.

On December 23, 2009, this Court granted summary disposition in favor of the defendant Lake Walden Country Club, Inc. on all claims involved in this case excluding Count IV of the plaintiff's complaint by written opinion. The plaintiff, Majestic Golf, LLC, filed a motion for reconsideration pursuant to MCR 2.119(F) on January 22, 2010, which this Court accepted as timely as the parties did not receive notice of the Court's Opinion and Order on summary disposition until early January. Majestic's motion for reconsideration presents substantially the same arguments that its briefs on the parties' motions for summary disposition addressed. Having carefully re-reviewed these arguments, the Court is not convinced that it committed palpable error in this case as required by MCR 2.119(F)(3) to mandate reversal. The Court is also disinclined to give Majestic a "second chance" as permitted by the rule. *Kokx v Bylenga*, 241 Mich App 655, 659 (2000). Consequently, the Court declines to reconsider its earlier decision with the exception of the following clarifications.

The Court reaffirms that its reliance on *Geno Enterprises v Newstar Energy*[1] and the

[1] *Geno Enterprises Inc v Newstar Energy USA, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 5, 2003 (Docket No 232777).

equitable principles contained in the Court of Appeals opinion was appropriate. Majestic argues that reliance on *Geno* contradicts the dictates of older, published Michigan case law. The Court disagrees, and concludes after its own research that, as *Geno* noted, "[t]here is no Michigan precedent compelling a court to automatically declare a forfeiture under a contract provision without looking to the equity of the situation." One established equitable principle for which there is copious persuasive authority is, as the American Jurisprudence encyclopedia records and as *Geno* cited approvingly,

> "Forfeitures are not favored in equity, and unless the penalty is fairly proportionate to the damages suffered by reason of the breach, relief will be granted against a forfeiture... This is particularly true where the breach is of a covenant of minor importance, as, for example, where a tenant's default under the lease is a technical one and the tenant has duly paid rent and taxes on the property over a long period of time, has substantially complied with the other lease obligations, and offers promptly to cure the default."

The Court remains convinced that the situation described in that passage is apposite to the facts of this case.

Majestic argues that the Court's decision "re-writes the parties agreement" and is therefore unlawful. Majestic elsewhere invites the Court to "fashion an equitable solution" that is more favorable to Majestic by holding that Lake Walden's default has forever extinguished their option. The Court responds that it has not rewritten the parties' contract but has instead applied the equitable principles, adopted in Michigan law by the Court of Appeals in *Geno*, which the courts are instructed to consider in giving effect to the parties' agreement. Moreover, while Majestic invites the Court to "fashion an equitable solution" more favorable to Majestic, the Court does not have *carte blanche* power to do so and must act only on the authority, both binding and persuasive, that govern similar factual circumstances.

Thus, despite Majestic's invitation, the Court has no authority in this case to find that the option is extinguished because of the default. Contrary to Majestic's reading of the Lease, §17(C) states "[t]he option may be exercised only if Tenant *is not in default* of this Lease *at the*

time of exercise." (emphasis supplied). This provision addresses a present default, not a default that has occurred but is subsequently cured. Therefore, the Court holds that Lake Walden's option has not been extinguished completely, and Lake Walden may still exercise the option but only after the existing default has been cured.

Finally, Majestic requests the Court to clarify several procedural aspects of its ruling, and the Court will gladly acquiesce. The Court agrees with Majestic that dismissal of Count V of the complaint is without prejudice and does not adjudicate the merits of that claim. Further, the claim that Count IV would be moot if the Court ruled in the defendant's favor was not addressed by either party in their prior motions. However, with the concurrence of the plaintiff that the claim is no longer at issue, the Court will dismiss Count IV without prejudice. Lastly, Count II of the counter-complaint was partly disposed of by this Court's prior Opinion and Order to the extent that the claim requests a decision on the issues of breach and termination, though that claim does remain viable concerning the request to declare the restrictions invalid.

This order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

Michael P. Hatty
Circuit Court Judge

C

STATE OF MICHIGAN

COURT OF APPEALS

MAJESTIC GOLF, L.L.C.,

Plaintiff/Counter Defendant-Appellant/Cross Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC.,

Defendant/Counter Plaintiff-Appellee/Cross Appellant.

FOR PUBLICATION
July 10, 2012
9:00 a.m.

No. 300140
Livingston Circuit Court
LC No. 09-024146-CZ

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

WILDER, P.J.

In this case, involving a commercial real-estate contractual relationship, plaintiff appeals as of right from an opinion and order granting it summary disposition in part and denying it summary disposition in part. Defendant cross-appeals as of right from the same order. We affirm in part, reverse in part, and remand.

I. BASIC FACTS

In 1991, Waldenwoods Properties, L.L.C. ("WPL") started planning for a "golf course-real estate development" on approximately 1,400 acres of land it owned. As planned, the golf course was to be constructed on approximately 400 acres, and residential properties were going to surround the golf course. WPL planned to lease the land for the golf course ("the Golf Property" or "the Premises") to a different entity that would be responsible for constructing and operating the golf course.

On December 8, 1992, WPL (as landlord) and defendant (as tenant) entered into a lease agreement ("Lease") for a period of 25 years. The Lease contained the following relevant paragraphs:

> ¶ 17: **OPTION TO PURCHASE.** Tenant is hereby granted an exclusive option to purchase the Premises on the following terms and conditions:
>
> A. The option shall be exercisable at any time during the final ten (10) years of the Lease term, excluding however the final six (6) months.

B. Exercise of the option shall be in writing, delivered to Landlord.

C. The option may be exercised only if Tenant is not in default of this Lease at the time of exercise.

D. The price shall be determined by appraisal of the fair market value of the Premises as of the date of exercise of the option, but in the condition and state they are in as of the date of executing this Lease, with the assumption they are not subject to this Lease and are restricted to golf course use.

* * *

H. Each party at its own expense shall retain an appraiser within thirty (30) days after the option is exercised. Within ninety (90) days after the option is exercised, the parties shall exchange appraisals. If the higher is no more than Ten Percent (10%) higher than the lower, the average of the two (2) shall be the purchase price. If the higher is more than Ten Percent (10%) higher than the lower, the two appraisers within thirty (30) days shall select a third appraiser who shall review the two (2) appraisals and within an additional (30) days determine the purchase price, which shall be no less than the lower appraisal and no higher than the higher appraisal. The cost of the third appraiser shall be borne equally by the parties.

* * *

K. If this Lease terminates for any reason prior to Tenant exercising its option to purchase, the option shall automatically terminate on termination of the Lease.

* * *

¶ 22: **LANDLORD'S EASEMENTS AND ROAD CROSSINGS.** Tenant shall permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate. The easements and crossings shall be installed by Landlord at its expense but located in areas mutually agreeable. The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [sic] preserved, leaving the golf course in equal or better condition.

* * *

¶ 26: **DEFAULT.** Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.

* * *

D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance

is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;

* * *

If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder.

* * *

¶ 31: NOTICES. Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the Premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:

A. If by Landlord, by mailing the same to Tenant by registered mail, postage prepaid, return receipt requested, addressed to Tenant at 4662 Okemos Road, Okemos, Michigan 48864, or at such other address as Tenant may from time to time designate by notice given to Landlord by registered mail.

At the time the Lease was originally signed, both parties anticipated the construction of the "golf-real estate development." Defendant was to develop the then-undeveloped Golf Property into 27 golf course holes, and WPL was to develop the surrounding land into residential real estate.

Defendant complied with its obligation under the Lease to construct the 27-hole golf course. Plaintiff has not yet initiated construction on the residential real estate. Defendant had paid rent in a timely manner and fully complied with all of its other obligations under the Lease until the instant litigation commenced.

According to defendant, it invested more than $6 million in the Golf Property and has paid over $1.6 million in rent to plaintiff. According to Frank Crouse, a manager of both WPL and plaintiff, defendant recovered its investment in the Golf Property within the first six years.

In March 2003, defendant and WPL (later, plaintiff, as WPL's successor interest, see *infra*) began merger negotiations. In the potential merger, defendant was to transfer all of its interest in the Golf Property to plaintiff in exchange for an 85 percent membership interest in plaintiff. These merger negotiations continued until the present litigation began.

On October 27, 2006, Crouse (as manager of WPL) sent a letter to Pat Hayes, defendant's president. In this letter, he discussed the status of the ongoing merger negotiations and also discussed the status of the zoning approval process for WPL's "Master Plan" for development. He listed six necessary points of agreement for a successful merger and approval of the Master Plan. The fifth point of agreement required defendant's approval of a "road easement" between holes #21 and #22 (the "Road Easement"). WPL needed defendant's approval of the Road Easement for final approval of WPL's Master Plan.

On April 3, 2007, WPL conveyed title to the Golf Property to plaintiff,[1] and plaintiff became the successor in interest to WPL's interest in the Golf Property. But WPL continued to own the land surrounding the Golf Property. On April 26, 2007, plaintiff presented to defendant a document titled "Consent to Grant of Easements." This "Consent" document was styled as a formal contract, and it included detailed maps and descriptions of the Road Easement.

On June 1, 2007, Crouse met with defendant's representatives to discuss the proposed merger and proposed Master Plan. According to the summary of the meeting, defendant reviewed plaintiff's proposed Road Easement and suggested certain changes. According to Crouse, none of defendant's suggested changes addressed the Road Easement's location.

On June 19, 2007, Crouse sent an e-mail to James Hile (a representative of defendant). The e-mail stated that he would make "the appropriate changes previously agreed to" for the Road Easement. Crouse reminded Hile that defendant's consent to the Road Easement was necessary for approval of the Master Plan.

According to Crouse, a revised version of the Road Easement was delivered to defendant on November 5, 2007, for defendant's consent. According to Crouse, the revised version incorporated some of defendant's recommended changes to the Road Easement, although the location of the easement remained the same.

The discussions between plaintiff and defendant continued and finally culminated in letter dated October 7, 2008, from Crouse to Hayes. The letter read as follows:

> I am writing on behalf of both Waldenwoods Properties, LLC [WPL] and Majestic Golf, LLC to request that you execute the Consent portion of the enclosed Grant of Easement and return it to me for recording. As you will recall, Section 22 of the golf course lease obligates Lake Walden to permit road crossing easements when required by Waldenwoods for development of its adjoining land. Sometime ago Waldenwoods requested a crossing easement from Majestic Golf, which owns the golf course land. Majestic Golf approved the request, and on that basis a proposed easement between Majestic and Waldenwoods was sent to Lake Walden on April 26, 2007 for review and consent.

[1] WPL is the only member of plaintiff.

> Following receipt and review of the document, you requested some changes. Those were made, and the document was resubmitted to golf course management with a request to execute the Consent. This occurred, I believe, late in 2007. Despite the request, the written Consent has not been received. Concurrence by Lake Walden is urgently required.
>
> I am requesting that Lake Walden fulfill its obligation under the lease. Please sign and return the enclosed Consent within thirty (30) days.

The next day, on October 8, 2008, Crouse sent an e-mail to both Hile and Hayes. This e-mail stated in relevant part:

> While we still very much hope that a cooperative merger will take place, we have found it necessary to prepare for the circumstance that it may not, because the differences are found to be irreconcilable. . . .
>
> If an agreement cannot be reached, then we may be presented with a notice by Lake Walden of its intent to exercise the purchase option included in our lease. Accordingly, we are providing the following attachments.
>
> * * *
>
> **Attachment 2—A letter requesting Concurrence by Lake Walden in the crossing easement**, that has been in process since early 2007. The crossing easement has not changed – hence the legal descriptions finalized by Desine Inc.[ ]are dated 3/9/2007. We received approval subject to modifications to meet certain LWCC objections, and have previously asked for your concurrence, which has not been provided as is required by Section 22 of the Lease. Failure to obtain Lake Walden concurrence was a major reason why we were not able to finalize a Master Plan for our property. Now we again request that Lake Walden promptly fulfill its obligation under the lease.
>
> * * *
>
> ***We do not intend any of these items to be interpreted that we do not wish to successfully conclude a merger*** – as you recall, it is WPL that has attempted to have this matter continue to receive consideration. ***We are still hopeful that this process will be successful.*** [Emphasis in original.]

According to Crouse, on November 10, 2008, defendant presented plaintiff with defendant's revised merger documents. These documents continued to claim that consent to the Road Easement was contingent upon finalization of the merger. Crouse stated that these documents were unreasonably one-sided in favor of defendant.

On November 24, 2008, legal counsel for plaintiff sent a letter to defendant. This letter stated in relevant part:

> The refusal of Lake Walden Country Club, Inc. to execute and deliver the Consent to the Grant of Easements sent to you on October 6, 2008 [sic – October 7, 2008] constitutes a default under the provisions of Paragraph 26 D of the Lease. On account of this default, Majestic Golf, LLC is hereby exercising its right under Paragraph 26 to terminate the Lease, effective immediately. Because of this termination, all rights granted to Lake Walden Country Club, Inc. to purchase the property pursuant to Paragraph 17 K of the Lease are also terminated, effective immediately.

On December 11, 2008, legal counsel for defendant sent a responding letter to plaintiff. Defendant's counsel stated that it was always the parties' intent to execute the Road Easement at the merger closing. He further stated that defendant was interpreting the November 24, 2008, letter as the formal 30-day notice required under the Lease. He included defendant's revised version of the Grant of Easement and concluded by stating that defendant would agree to the new terms of the Grant of Easement to comply with the Lease. The revised documents were unsigned. In fact, defendant never signed any document to consent to plaintiff's Road Easement.

On December 22, 2008, legal counsel for defendant sent another letter to plaintiff, informing plaintiff that defendant was exercising its option to purchase the Golf Property under Paragraph 17 of the Lease. Defendant stressed that, under the terms of the Lease, each party must obtain an appraisal. The parties procured appraisals, where Plaintiff's appraisal value of the Golf Property was $800,000, and defendant's effective market value of the Golf Property was $0.[2]

Plaintiff filed its First Amended Complaint on May 21, 2009. Count I sought specific performance of Paragraph 29 of the Lease, which required defendant to vacate the Golf Property upon termination of the Lease. Count II sought a declaratory order stating that defendant's attempt to exercise the option to purchase under Paragraph 17 of the Lease was invalid because the Lease had terminated before defendant's attempt to exercise the option. Count III sought a stay of the 90-day appraisal period stated in Paragraph 17 of the Lease, pending the trial court's resolution of the other issues of the case. Count IV sought a declaratory judgment and order for payment for defendant's reasonable rental value of the Golf Property during the case. Count V sought a declaratory judgment that defendant's option to purchase was void because defendant's appraisal of $0 was submitted in bad faith.

Defendant filed its counterclaim on June 26, 2009. Count I sought specific performance of the appraisal and option to purchase provisions of Paragraph 17 of the Lease. Count II sought a declaratory order stating that (1) defendant did not breach the Lease, and (2) defendant properly exercised the option to purchase on December 22, 2008.

Defendant moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10) on August 27, 2009. Plaintiff, without referencing a court rule, countered by moving for summary disposition on September 24, 2009.

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[2] Defendant explains that this value was derived using the appraisal instructions in the Lease.

The trial court, while applying only MCR 2.116(C)(10), issued its Opinion and Order on December 23, 2009. It identified three issues:

> The first issue is whether or not [defendant] defaulted on the lease after receiving notice of non-compliance with an obligation and an opportunity to cure that non-compliance via the Crouse letter on October 7, 2008. The second is whether, if [defendant] defaulted, such default warranted termination of the lease and, by extension, termination of their option to purchase the subject property. The final issue is whether, if [defendant] did properly invoke its option, either or both of the appraisals should be stricken by the Court as failing to comply with the appraisal procedures defined by ¶ 17(D) of the lease.

The trial court first held that defendant defaulted under the terms of the Lease. It explained that Paragraph 22 of the Lease obligated defendant to agree to the requested easements. It further explained that the October 7 Letter provided the requisite notice under Paragraph 26 of the Lease, stating:

> It is inconsequential that the October 7 letter did not call itself notice or reference an existing default. As the plaintiff argues, a default did not exist until after 30 days of non-performance following the transmission of this letter. Further, the terms of the lease do not require that the notice label itself as such but require only that the landlord inform the tenant that it has not performed an obligation under the lease, which this letter did. The October 8 e-mail from Crouse to Pat Hayes and James Hile does not contextualize away the sufficiency of this notice either but rather bolsters it. Although Crouse does express a desire to continue the negotiations, he also recites in the e-mail the defendant had not fulfilled its obligation under ¶ 22 of the lease and reiterates his request that the defendant do so. Finally, the allegation that the parties had agreed to another period for performance of this consent to easement is similarly immaterial. The obligation to permit easements is stated in mandatory language, and the time of performance is only contingent upon a mutually agreeable location being chosen. The lease itself under ¶ 43 limits modification of its terms by requiring a written instrument executed by both parties. Therefore, what the parties agreed orally as to when performance would occur was irrelevant since the plaintiff had a right to demand performance under the lease.

The trial court held that, because defendant did not provide its consent to the requested easements within 30 days of receiving the October 8 letter, defendant breached the Lease.

The trial court then held that termination of the Lease was not proper under principles of equity. The trial court concluded that termination was not warranted because defendant's breach was not material. It reasoned that defendant had invested over $6 million in the Golf Property and had paid its rent in a timely manner. The trial court also reasoned that any wrongful withholding of consent to the easement would be compensable in money damages. Thus, the trial court concluded that forfeiture of the Lease would be "unduly harsh and oppressive."

The trial court declined to address the third issue. It noted that defendant did not properly exercise the option under Paragraph 17 because it breached the Lease before its attempt to exercise the option. The trial court concluded its opinion as follows:

> 1. As to Count I of the plaintiff's complaint seeking an order that the defendant surrender the lease premises, the defendant's motion for summary disposition is GRANTED. Because there is no genuine issue of material fact and the defendant's breach was not material, the plaintiff cannot succeed on that claim.
>
> 2. With respect to Count II of the plaintiff's complaint, the plaintiff's motion for summary disposition is GRANTED in part since the defendant's attempt to exercise their option to purchase was ineffective as a result of the defendant's default. However, because the defendant's breach was not material, the option has not indefinitely lapsed.
>
> 3. Consistent with this ruling, summary disposition is GRANTED in favor of defendant as to Count V of plaintiff's complaint and in favor of plaintiff as to Count I of the defendant's counter-complaint.
>
> 4. Finally, with respect to Counts III and IV of the plaintiff's complaint, the defendant's motion is DENIED. Count III was previously disposed of by the Court in issuing a preliminary injunction, and Count IV is not germane to the instant motion.

On January 22, 2010, plaintiff moved for reconsideration. Plaintiff urged the trial court to reconsider its holding that equitable considerations prohibited plaintiff from terminating the Lease. Plaintiff also urged the trial court, as a procedural matter, to dismiss Count IV of plaintiff's first amended complaint without prejudice. On March 31, 2010, the trial court declined to reconsider the substance of its previous order. However, the trial court agreed to dismiss Count IV without prejudice.

On August 23, 2010, the parties stipulated to dismissal of Count II of defendant's counter-complaint, which resolved the final issue and closed the case.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Issues involving either contractual interpretation or the legal effect of a contractual clause are reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811

(2008). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *Id.*

A. PLAINTIFF'S APPEAL

Plaintiff first argues that the trial court improperly utilized the "material breach doctrine" in deciding whether plaintiff could invoke the forfeiture clause in the Lease. We agree.

"A contract must be interpreted according to its plain and ordinary meaning." *Alpha Capital Mgmt v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). Where "contractual language is unambiguous and no reasonable person could differ concerning application of the term or phrase to undisputed material facts, summary disposition should be awarded to the proper party." *Id.* at 612.

The forfeiture clause is located in Paragraph 26 of the Lease and provides as follows:

> ¶ 26: **DEFAULT**. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.
>
> * * *
>
> D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;
>
> * * *
>
> If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder.

Thus, according to the plain and unambiguous terms of the Lease, plaintiff could "cancel and terminate" the Lease if defendant failed to comply with *any* obligation (with the exception of the failure to pay rent) and that failure to perform continued for 30 days after defendant was formally notified, pursuant to Paragraph 31 of the Lease, of the failure to perform.

As we discuss in defendant's cross-appeal, *infra*, we find that there is no question of fact that the October 7, 2008, letter complied with notice requirements of Paragraph 31 of the Lease. Therefore, to avoid defaulting according to the terms of the Lease, defendant had 30 days from October 8, 2008, to cure its non-performance. The record is clear that defendant did not respond to plaintiff's letter by November 7, 2008. Therefore, under the plain language of Paragraph 26,

the default occurred on or about November 7, 2008. The trial court correctly reached this conclusion.

Defendant, however, asserts that plaintiff breached the contract first, when it recorded a document in the Livingston County Register of Deeds in February 2008. But defendant does not explain what covenant of the Lease plaintiff allegedly violated and also does not provide any authority in support of why this alleged "breach" prevents plaintiff from adhering to other aspects of the Lease. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for his or her claims." *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). Consequently, we decline to consider defendant's argument.

Even though the trial court correctly found that defendant breached the Lease, the trial court refused to allow plaintiff to terminate the Lease because it concluded, under the "material breach doctrine," that forfeiture of a lease pursuant to a termination clause is not warranted where the breaching party committed an immaterial breach. We find that the trial court erred by not applying the plain language of the contract.

This Court has not, in a published opinion, addressed the applicability of the material breach doctrine in circumstances where the contract at issue contains an express forfeiture clause. Before addressing that question directly, we first note that there is a difference between "rescission," "termination," and "forfeiture" of a contract. Rescission is an equitable remedy that is used to avoid a contract. See *Alibri v Detroit/Wayne Co Stadium Authority*, 254 Mich App 545, 555; 658 NW2d 167 (2002), rev'd on other grounds 470 Mich 895 (2004); Black's Law Dictionary (9th ed).

> Generally, to rescind a contract means to annul, abrogate, unmake, cancel, or avoid it. More precisely, rescission amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination.
>
> The word "termination" generally refers to an ending, usually before the end of the anticipated term of the contract. Rescission of a contract constitutes termination of that contract with restitution. On the other hand, a forfeiture, properly exercised, terminates a contract without restitution. [17B CJS, Contracts, § 585, pp 18-20 (footnotes omitted).]

In addition:

> A forfeiture is that which is lost, or the right to which is alienated, by a breach of contract. *Unless there is a provision in a contract clearly and expressly allowing forfeiture*, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract *expressly provides for it.*
>
> The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contact in that it is an assertion of a right growing out of the contract; if it puts an end to the contract and extinguishes it in accordance with its terms similarly to

> the manner in which it is extinguished by performance. Forfeiture terminates an existing contract without restitution, while a rescission of a contract generally terminates it with restitution and restores the parties to their original status. [17B CJS, Contracts, § 612, pp 48-49 (emphasis added, footnotes omitted).]

In sum, "rescission" terminates a contract and places the parties in their original position, even if restitution is necessary, and "forfeiture" terminates a contract without restitution. Here, because plaintiff seeks to enforce the termination clause in the contract, we conclude that the equitable remedy of rescission is not at issue. We further conclude that, by reading the default provision of the Lease to include the term "material breach," the trial court effectively rewrote or reformed the contract. See *Titan Ins Co v Hyten*, 291 Mich App 445, 451-452; 805 NW2d 503 (2011); Black's Law Dictionary (9th ed).

Our view is supported by our Supreme Court's consistent pronouncements that an unambiguous contract *must* be enforced as written unless it violates the law, is contrary to public policy, or is unenforceable under traditional contract defenses. *Rory v Continental Ins*, 473 Mich 457, 470; 703 NW2d 23 (2005); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52, 62-63; 664 NW2d 776 (2003); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). In *Rory*, the Supreme Court stated:

> This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law . . . . The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
>
> "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." [*Rory*, 473 Mich at 469-470, quoting *Wilkie*, 469 Mich at 51-52, quoting 15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17 (footnotes omitted).]

Although *Rory* did not expressly decide whether a contract forfeiture clause was enforceable, it made clear that a court has no power to ignore a contract's plain and unambiguous term because the court holds the view that the term ostensibly was "unreasonable." *Rory*, 473 Mich at 465. Rory is applicable here on this very point; this Court cannot refuse to enforce the

plain and unambiguous terms of the lease herein on the basis that the forfeiture clause is "unfair." Hence, we reiterate the Supreme Court's holding that courts are not free to rewrite or ignore the plain and unambiguous language of contracts except in exceptional circumstances. *Id.* at 470.

Defendant has not established that the requisite exceptional circumstances exist in this case, sufficient to ignore the plain language of its contract with plaintiff. First, defendant makes no claim that the forfeiture provision violates the law. Likewise, we find that the forfeiture clause is not contrary to public policy.

> [T]he determination of Michigan's public policy "is not merely the equivalent of the personal preferences of a majority of [the Supreme] Court; rather, such a policy must ultimately be clearly rooted in the law." In ascertaining the parameters of our public policy, we must look to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." [*Id.* at 470-471, quoting *Terrien v Zwit*, 467 Mich 56, 66-67; 703 NW2d 23 (2002).]

While the Legislature has limited the effectiveness of express forfeiture clauses in land contracts, MCL 600.5726 (requiring the occurrence of a material breach as a precondition of forfeiture of a land contract, regardless of whether the contract has an explicit termination or forfeiture clause), notably the Legislature has not limited the operation of forfeiture clauses in other contexts. Additionally, forfeiture clauses have existed in contracts in this state for more than 100 years. See, e.g., *Hamilton v Wickson*, 131 Mich 71; 90 NW 1032 (1902); *Satterlee v Cronkhite*, 114 Mich 634; 72 NW 616 (1897). Thus, we cannot conclude that forfeiture clauses in a contract that is *not* a land contract violate public policy.

As the *Rory* Court stated, "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of [legal] contract provision[s]." *Rory*, 473 Mich at 470. Such defenses include duress, waiver, estoppel, fraud, and unconscionability. *Id.* at 470 n 23. Here, the only recognized defense that could possibly be relied on, based on defendant's pleadings, is the doctrine of unconscionability. However, "[i]n order for a contract or a contract provision to be considered unconscionable, *both procedural and substantive unconscionability must be present.*" *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 144; 706 NW2d 471 (2005) (emphasis added).

> Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. [*Id.* (citations omitted).]

Here, there was no evidence that defendant was in a weaker position than plaintiff and was forced to accept the forfeiture term. Thus, defendant cannot establish any procedural unconscionability. We also conclude that the forfeiture clause was not substantively unconscionable. While the term undoubtedly favors plaintiff, the advantage given to plaintiff in the contract does not shock the conscience. In addition, forfeiture did not occur immediately upon defendant's breach; the Lease allowed defendant 30 days to cure any breach before the Lease would be terminated. Under these circumstances, the forfeiture clause was not "substantively unreasonable." Therefore, the forfeiture provision was not avoidable under the unconscionability doctrine.

In sum, "a court may not revise or void the unambiguous language of [an] agreement to achieve a result that it views as fairer or more reasonable." *Rory*, 473 Mich at 489. As a result, the trial court erred when it failed to enforce the forfeiture clause of the Lease based on defendant's breach not being a "material breach." As a matter of law, plaintiff successfully invoked the default provision of the Lease and terminated the Lease on November 24, 2008. Under Paragraph 17 of the Lease, the Lease's termination also extinguished defendant's option to purchase. Hence, because the Lease was terminated on that date, defendant's attempt to exercise the Lease's option-to-purchase provision on December 22, 2008, was void.

B. DEFENDANT'S CROSS-APPEAL

Defendant argues that it did not breach the contract when it failed to agree to the easement agreement. Specifically, defendant argues that (1) the easement agreement was to be finalized and executed at the conclusion of the merger negotiations, (2) the parties never reached an agreement with respect to the terms of the easement, and (3) plaintiff's October 7, 2008, letter did not comply with the notice provision of Paragraph 26. We conclude that defendant was not excused from complying with its obligation under the Lease.

Paragraph 22 of the Lease stated,

> Tenant *shall* permit drainage and utility easements and road crossings to be developed by Landlord on the Premises *as required* to permit development to occur on Landlord's Other Real Estate. . . . [Emphasis added.]

Thus, defendant was required to consent to plaintiff's Road Easement. The Lease, however, did provide that the location of any easements must be "in areas mutually agreeable." As such, the only valid reason to withhold consent to the Road Easement would have been the failure to agree on a location. However, there was no evidence to show that defendant's refusal to consent was based on an objection to the location.[3] We note that, during this 30-day window, defendant failed to make *any* objection or provide any rationale for its refusal to consent. Defendant's next communication was issued on November 10, 2008, which was after the 30-day deadline expired.

[3] In fact, the document that defendant *provided* to plaintiff in December 2008 used the same location for the easement that plaintiff initially proposed.

Therefore, defendant's failure to consent to the Road Easement was a breach of the plain and unambiguous terms of the Lease.

Defendant also argues that consent to the Road Easement was not required because it was contingent upon finalization of the merger agreement. While the parties undoubtedly discussed that consent would occur contemporaneous to a merger, there was no evidence that the parties intended to amend, or did amend, the provision of the Lease that defendant give consent "as required."

Defendant further contends that the easement agreement was not ripe for its consent because the agreement failed to capture other conditions, such as (1) noting that all costs were plaintiff's responsibility, (2) ensuring that the integrity of the golf course would not be disturbed, and (3) ensuring that the golf course would be left in an equal or better condition when the work was complete. Nothing in Paragraph 22 makes defendant's requirements to grant an easement contingent on these asserted conditions.[4] Thus, defendant's insistence that the Lease required these provisions in any easement agreement is without merit.

Last, defendant claims that plaintiff's October 7, 2008, letter did not satisfy the notice requirements spelled out in Paragraph 31 of the Lease. We disagree. Paragraph 31 provides, in pertinent part,

> Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the Premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:
>
> A. If by Landlord, by mailing the same to Tenant by registered mail, postage prepaid, return receipt requested . . . .

Defendant claims that the October 7, 2008, letter was deficient in several ways: (1) it was not sent via registered mail, (2) the letter did not provide any notice, and (3) the letter did not indicate what consequences would happen if the 30-day deadline was not met.

Nothing in the record supports defendant's claim that the letter was not sent via registered mail. Defendant cites to the letter itself and cites to Crouse's affidavit as evidence of the letter not being sent via registered mail. However, the letter does not identify either way how it was mailed. And Crouse states in his affidavit that he mailed the letter "consistent with notice provisions contained in the Lease."

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[4] We note that if plaintiff were to have undermined the integrity or condition of the golf course through construction or maintenance of easements, defendant would have been entitled to a variety of possible contract remedies.

Defendant's remaining claims of deficiencies are also without merit. The Lease does not require any written notice to contain any specific words, such as "notice" or "default." The letter referenced defendant's continuing obligation under Paragraph 22 of the Lease to provide the consent, explained that defendant has been delinquent for nearly a year, and established a 30-day time period to cure the defect. This 30-day time period matches the 30-day time period of Paragraph 26. Therefore, the trial court correctly concluded that the letter satisfied the notice requirements of the Lease.

Defendant's final issue on cross-appeal relates to whether its invoking of the option to purchase was invalid. As discussed, *supra*, we conclude that plaintiff properly terminated the Lease prior to defendant invoking the option, thereby making defendant's attempt to purchase void. Although the trial court concluded that defendant could not invoke the option to purchase for different reasons, we will not reverse a trial court's ruling when it reaches the right result for the wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

C. CONCLUSION

In conclusion, the trial court erred when it did not interpret the Lease according to its plain and unambiguous terms. On remand, the trial court is to enter an order granting summary disposition in favor of plaintiff on its Counts I, II, and V.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

Westlaw

Not Reported in N.W.2d, 2009 WL 3013258 (Mich.App.)
(Cite as: 2009 WL 3013258 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
CONSOER TOWNSEND ENVIRODYNE ENGINEERS INC, Plaintiff/Counter–Defendant Appellant,
v.
CITY OF GRAND RAPIDS, Defendant/Counter–Plaintiff Appellee.

Docket No. 283563.
Sept. 22, 2009.

West KeySummaryMunicipal Corporations 268 ⇐364

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k355 Performance of Work
268k364 k. Excuses for nonperformance or defects. Most Cited Cases

Public Contracts 316H ⇐347

316H Public Contracts
316HIX Performance or Breach
316Hk347 k. Sufficiency of performance in general. Most Cited Cases

Trial court did not err when it dismissed an engineering contractor's claim against a city for breach of an engineering services contract. The contractor was obligated under the agreement to present design drawings to the city by certain deadlines, yet it failed to do so. The drawings that were submitted had sufficiencies and were not biddable. The contractor later informed the city that it was already over budget for those services and that it needed an additional $766,000 to complete the remaining components of that phase of the contract. In city's view, the increase was unjustified because the contractor did not identify any additional out-of-scope work, but merely reflected what remained to be done as outlined in the agreement for the contract price stated. The contractor never completed the additional drawings and the city hired another engineering firm to complete the work.

Kent Circuit Court; LC No. 02–007186–CK.

Before: M.J. KELLY, P.J., and K.F. KELLY and SHAPIRO, JJ.

PER CURIAM.

*1 Plaintiff Consoer Townsend Envirodyne Engineers (CTE) appeals as of right the trial court's order and opinion dismissing its claims against defendant and entering judgment for defendant in the amount of $1,002,399. We affirm.

I. Basic Facts and Procedural History

This appeal involves the breach of an engineering services agreement. In the early 1990s, the city of Grand Rapids sought to update its wastewater treatment plant. Its then current system, the "Zimpro heat treatment process," was nearing the end of its life cycle and would soon become more costly to maintain. The city solicited applications from professional engineering services and selected CTE for the project.

A. The Contract

Subsequently, in March of 1996, CTE and the city entered into an engineering services contract. The contract divided the work to be completed into three phrases: (1) a study phase; (2) a design phase; and, (3) a construction phase. Pursuant to the contract, CTE was only authorized to proceed with the study phase, which was to be completed on August 31, 1996. The contract did not include specific deadlines for other phases of the project, but provided the following:

If the City elects to have the Engineer proceed

with the Design Engineering Phase and/or the Construction Engineering/Inspection Phase services, the Engineer will similarly commence said services as the project schedule requires, will *proceed diligently* with such services and will complete the same within the time frames as outlined in the Engineer's proposal ... or as mutually agreed to by the City Engineer and the Engineer.

The contract mandated that the city must authorize CTE to proceed with the project's other phases. CTE was to receive not more than $197,740 for phase I and, if authorized, $435,800 for phase II, and $478,860 for phase III. Further, the contract contained a termination clause, which stated:

10. *Termination.* The obligation to provide further services under this agreement may be terminated by either party upon seven (7) days written notice in the event of substantial failure of the other party to perform in accordance with the terms of this agreement through no fault of the terminating party. Also, the City reserves the right to terminate this agreement upon the aforesaid seven days written notice in the event the city elects to delete the project, change the scope of the project, or seek another engineering firm to provide professional engineering services in connection with the project. However, the Engineer will be paid for the actual services satisfactorily rendered to date of termination, including the associated prorated share of the profit.

B. Phase I Implementation

CTE satisfactorily completed phase I of the project and it is not at issue in this appeal. However, on March 10, 1998, while CTE was still conducting a cost-benefit analysis as part of the phase I services, the existing Zimpro system failed. As a result of the system's failure, the city was no longer able to store sludge and all sludge had to be land-filled, rather than sold and applied to the land as fertilizer. Sometime later in March 1998, CTE completed its cost-benefit analysis report, which recommended that the city implement an anaerobic digestion system with cogeneration facilities and sludge storage facilities with contracting for disposal. In August 1998, CTE produced its final preliminary design report (PDR), which summarized all of the design components that had been discussed and identified all the components that were to be included in the updated project. CTE estimated the total cost of the project to be $18,961,900.

B. Phase II Implementation

*2 Upon receiving and reviewing the final PDR, the city commission, in September 1998, approved CTE to begin phase II of the project consistent with CTE's recommendation in the PDR. Because the final report increased the scope of work, the city approved an increase in compensation from $435,800 to $925,900 for the phase II services.

On October 27, 1998, CTE and the city met for a phase II "kick-off" meeting. At this meeting, the parties agreed that phase II would be completed when CTE submitted completed and biddable drawings for all facilities included in the project. Drawings for the cogeneration facilities and rehabilitation of the existing digester were due in January 1999, while drawings for the new digester were due in April of 1999. The first priority, however, was the completion of the sludge storage facility drawings by December 1, 1998, so that the tanks could be completed and ready for use by October 1999. [FN1] CTE indicated that the design schedule would permit the city to take advantage of the 1999 construction season in order to meet this end.

FN1. The city wanted those facilities completed first so that it could store sludge over the winter in order to sell the sludge for land application the following spring. As indicated, since the Zimpro system had failed, the city had been unable to store any sludge for land application and all sludge was being landfilled at the risk of losing those consumers who purchased the sludge.

CTE was to carry-out phase II by submitting the design drawings at different stages of comple-

tion. However, by December 31, 1998, the city had received very little information regarding the sludge storage facility drawings. In late January of 1999, the city received the first set of design drawings for the sludge storage facility. However, those drawings, claimed to be 25 percent complete, were "sketchy" and not "really reviewable by the city." The next set of drawings, represented to be 50 to 60 percent complete, was delivered in March of 1999, and was only 20 to 30 percent complete. The final set of drawings was delivered in May of 1999, approximately half a year after the initial December 1998 deadline. Around the same time, CTE informed the city that the cost for the sludge storage tanks had doubled from $4.2 million, as estimated in the PDR, to $8.4 million.

It was soon discovered, however, that the final drawings for the storage tanks had deficiencies and were not biddable. Namely, the tank was too small and, thus, did not meet regulatory requirements, and also improperly overlapped onto an adjacent roadway and sat too near a river. Shortly thereafter, in June of 1998, CTE indicated that it was already $150,000 over the $925,900 budget for the phase II services and that it would need an additional $766,000 to complete the remaining components of phase II designated in the PDR, i.e., design drawings for the anaerobic digestion and cogeneration facilities. In the city's view, this increase in cost was unjustifiable because CTE's correspondence did not identify any additional out of scope work, but merely reflected what remained to be done as outlined in the PDR and agreed upon by the parties for the contract price of $925,900. The project was suspended until the fee issue could be resolved.

After failed attempts to move forward with CTE, the city, in June of 1999, hired another engineering firm to conduct a value engineering (VE) study to examine other available options during the summer of 1999. Ultimately, the city paid a total of $206,798 for this service. The results of this evaluation showed that the system CTE recommended was not a good cost-benefit for the city and another system was suggested. The city and CTE then engaged in a prolonged dialogue in an attempt to determine which option was the best for the city. In February 2000, CTE indicated in a letter to the city that the cost for the project would be $33 to $42 million. The city never terminated its contract with CTE, but received no more professional services from CTE after CTE's December 1, 2000 proposal. CTE never completed the additional phase II drawings as agreed on by the parties. In total, the city paid CTE $571,688 for the phase II services.

D. Pre–Trial Procedures

*3 On July 23, 2002, CTE filed an eight-count complaint against the city, alleging breach of contract (I), breach of implied contract (II), anticipatory breach (III), unjust enrichment (IV), quantum meruit (V), misrepresentation (VI), promissory estoppel (VII), and breach of an alleged settlement agreement (VIII). With respect to its contract claim, CTE claimed that the city owed it an outstanding amount of $522,674 for engineering services rendered. The city denied owing CTE any outstanding amount on the contract and it filed a counterclaim on January 7, 2003, seeking a refund of the amount it had paid CTE. The city alleged one count of breach of contract for CTE's failure to complete the design phase and two counts of negligence for plaintiff's failure to design a suitable plan.[FN2]

> FN2. CTE moved to dismiss the city's counterclaim on the basis that all of the city's claims were malpractice claims and therefore are barred by the two-year statute of limitations. The trial court denied the motion "for the reasons set forth on the record." The lower court record does not include a copy of this transcript. Nonetheless, it appears from other documents in the record that the trial court denied the motion because a material question of fact remained regarding when CTE stopped rendering services to the city.

Subsequently, the city moved for partial summary disposition. As a result, all CTE's claims were

dismissed except for its contract claim, which was dismissed to the extent that it sought payment of funds beyond that authorized by the city commission for phase II services. The remaining balance that plaintiff could potentially claim was $354,212.

A date was set for a bench trial and the parties submitted trial briefs. CTE argued that it provided the city with the engineering work requested, attributed the delay in the design phase to the city, and asserted that the city breached the contract by failing to pay the amount owed. CTE also contended that the city waived its contract claim because it failed to send CTE a written notice of termination as required by the contract. Lastly, CTE argued that all of the city's claims are barred by the two-year statute of limitations for malpractice actions. See MCL 600.5805(6).

The city countered that CTE's breach of contract claim is unavailing because CTE produced less than one-third of the project yet sought full compensation. The city further claimed that because the design engineering drawings that were submitted were "grossly deficient," would have exceeded the project's cost if implemented, and were submitted months late, CTE breached the contract and the city was owed a refund in the amount $571,688 in fees paid for the defective work plus consequential damages for the VE study. In addition, the city asserted that CTE committed malpractice as its performance and implementation of the project fell below the industry's standard of care.

E. Trial and Opinion

Sixteen months after a seven-day bench trial, the trial court ruled in favor of the city. The trial court agreed with CTE, that had the city pleaded only malpractice claims, its counterclaim would be barred by the statute of limitations for malpractice suits. However, the court determined that the city had timely pleaded a contract claim, as opposed to a malpractice claim, because the city pleaded breaches of specific requirements embodied in the contract. Accordingly, plaintiff's contract claim was not barred by the six-year statute of limitations for contract actions. See MCL 600.5807. The court further concluded that CTE had materially breached the contract by failing to produce the design plans on time, producing plans that were "seriously flawed," and designing storage tanks that would cost the city twice the amount estimated. Accordingly, the trial court found that the city was not obligated to pay CTE's outstanding invoices and was entitled to a refund of the amount it paid CTE for phase II services, as well as consequential damages for the amount paid for the subsequent VE study. The trial court awarded the city common law interest on these amounts, to be accrued from the date the refunded moneys were initially paid and from the date that the city paid for the engineering study, as well as statutory interest running from the date of the complaint. A judgment was entered to this effect, awarding the city a total of $1,002,399.

II. Statute of Limitations

*4 CTE first argues that the trial court erred by failing to recognize that the city's contract claim is more properly characterized as a malpractice claim and is thus time-barred by the two-year statute of limitations for malpractice actions. See MCL 600.5805(6); MCL 600.5807 (setting limitations period for contract actions at six years). According to CTE, the trial court erroneously allowed the city to circumvent the malpractice statute of limitations by embracing a "special contract" doctrine. We disagree. We review for clear error a trial court's findings of fact in a bench trial and its conclusions of law de novo. *City of Flint v. Chrisdom Properties Ltd,* ——Mich.App ——; —— NW2d —— (2009). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Moore v. Secura, Ins.,* 482 Mich. 507, 516, 759 N.W.2d 833 (2008). Further, whether a statute of limitations bars an action is a question of law that we review de novo. *Collins v. Comerica Bank,* 468 Mich. 628, 631, 664 N.W.2d 713 (2003).

It is true, as CTE states, that a malpractice claim may not be recast as a contract claim in order

to avoid the time-bar under the two-year statute of limitations for malpractice. When a contract requires no more than that which is required by the professional relationship, the action will sound in malpractice, not in contract, and the two-year limitations period for malpractice actions will apply. *Brownell v. Garber,* 199 Mich.App. 519, 525–526, 503 N.W.2d 81 (1993) ("[T]he allegations that the 'contractual' duties allegedly breached by defendant are indistinguishable from the duty to render legal services in accordance with the applicable standard of care [and the two-year limitations period for malpractice actions controls.]").

This does not mean, however, that a contract claim can never be brought against an individual or entity that renders professional services to a client. In certain instances, a "special agreement" may arise under which the professional has guaranteed a particular result or has agreed to act above the basic standard of professional care required such that a contract action will attach. *Stewart v. Rudner,* 349 Mich. 459, 467–468, 84 N.W.2d 816 (1957); *Bessman v. Weiss,* 11 Mich.App. 528, 531, 161 N.W.2d 599 (1968). The key to distinguishing between a malpractice action and a contract claim, and thus determining whether it is governed by a particular statute of limitations, is to look to the basis of the allegations and the type of interest that has allegedly been harmed. *Aldred v. O'Hara–Bruce,* 184 Mich.App. 488, 490, 458 N.W.2d 671 (1990). If a reading of the claim as a whole indicates that the defendant failed to exercise the requisite skill, the action is one in malpractice, but if the claim indicates that the professional failed to perform a special agreement, then the action is one in contract. *Id.; Brownell, supra* at 524, 503 N.W.2d 81. Thus, a claim regarding inadequate or faulty engineering services, in the absence of any breach of some special agreement, sounds in malpractice and must be governed by the malpractice statute of limitations, even if a claimant couches his complaint in breach of contract terms. See *Aldred, supra* at 490, 458 N.W.2d 671.

*5 After our review of the city's counterclaim and the surrounding factual record, we conclude, as the trial court did, that the city's claim is one for breach of contract. The counterclaim indicates that CTE breached specific provisions of the contract by failing to complete the phase II drawings, by submitting the design drawings months past the agreed upon due date, and by designing a wastewater treatment system, the construction of which, greatly exceeded the city's planned budget for the project. The damages the city suffered as a result of these actions flowed from CTE's failure to complete these specific acts contemplated by the parties in their agreement. In addition, the record supports the conclusion that the city's claim is not a malpractice action disguised as a contract claim: CTE produced less than one-third of the phase II drawings agreed upon, failed to abide by the agreed upon design schedule, and CTE subsequently doubled, as supported by some evidence, the project's originally estimated costs.

In light of the foregoing, it is plain to us that the city's damages stemmed not from failure to provide adequate engineering services, but from failure to abide by the specific requirements created by the contractual agreement between the parties. See *Aldred, supra* at 490, 458 N.W.2d 671. Thus, we cannot agree with plaintiff's contention that the agreement between it and the city contained no more than an agreement to provide competent engineering services consistent with the professional duty of care. See *Brownell, supra* at 525–526, 503 N.W.2d 81. The trial court did not err in determining that the city's contract action was not duplicative of its malpractice claims. Further, because the city filed its counterclaim in January 2003, its claim was asserted within the six-year limitations period for contract actions. Accordingly, the trial court did not err by concluding that the city's contract claim was timely filed.

III. Breach of Contract

CTE next argues that the trial court erred by concluding that CTE breached the contract and by

concluding that the city was entitled to recover for breach of contract. This Court reviews for clear error a trial court's findings of fact and its conclusions of law de novo. *City of Flint, supra.* Further, our review is de novo to the extent that we must interpret the meaning of the contract. *Auto Owners Ins. Co. v. Ferwerda Enterprises, Inc.,* 283 Mich.App. 243, 248, 771 N.W.2d 434; —— NW2d —— (2009).

A. Grounds for CTE's Breach

CTE first argues that the trial court erred by concluding that CTE breached the contract due to its failure to meet deadlines during phase II. According to CTE, it was not in breach because the contract did not contain a "time is of the essence clause," but merely implied a "reasonable time" for performance. We cannot agree. Generally, a party breaches a contract if it fails to perform a duty, promise, or obligation under the contract. See *Kiff Contractors, Inc. v. Beeman,* 10 Mich.App. 207, 209, 159 N.W.2d 144 (1968); *Schware v. Derthick,* 332 Mich. 357, 364, 51 N.W.2d 305 (1952). While the law does not compel exact and precise performance under a contract, it is necessary that there be substantial performance. *Antonoff v. Basso,* 347 Mich. 18, 28, 78 N.W.2d 604 (1956). Performance is not substantial if the deviation from what is required under the contract is "so dominant or pervasive as ... to frustrate the purpose of the contract." *Id.* at 30, 78 N.W.2d 604.

*6 Here, the contract required CTE to "proceed diligently" to complete phase I services by December 31, 1996. With respect to phase II, the contract in its original form did not include specific deadlines, but did provide the following in section 16:

> If the City elects to have the Engineer proceed with the Design Engineering Phase and/or the Construction Engineering/Inspection Phase services, the Engineer will similarly commence said services as the project schedule requires, will *proceed diligently* with such services and will complete the same within the time frames as outlined in the Engineer's proposal ... *or as mutually agreed* to by the City Engineer and the Engineer.

Subsequently, at the October kick-off meeting the parties agreed to an aggressive schedule due to the Zimpro system's failure. It was made clear at that meeting that the city needed the sludge storage facility drawings completed by December 1998. This was necessary, as discussed at the meeting, so that those facilities could be built and operational by October 1999 in order for the city to gain an economic advantage. CTE agreed to this aggressive schedule and by operation of section 16, was contractually bound to abide by this schedule under the contract.

CTE failed to produce any of the drawings on time. The final sludge storage facility drawings were submitted approximately half a year late, in May of 1999. As a result, the facilities were not constructed in October 1999. CTE also failed to meet the deadlines for the anaerobic digestion and cogeneration facility design drawings contemplated under the project. Given these facts, it is plain that CTE committed a material breach when it failed to produce the design drawings on time. See *Holtzlander v. Brownell,* 182 Mich.App. 716, 722, 453 N.W.2d 295 (1990). The city clearly did not receive the benefit that it expected to receive under the parties' agreement—an operational sludge facility in October 1999. *Id.* Rather, CTE's failure to produce the drawings on time frustrated the purpose of the contract. Thus, it cannot be said that CTE substantially performed its contractual duties, see *Antonoff, surpa,* but breached the contract. Accordingly, we conclude that the trial court did not err in concluding the same.

CTE contends, however, that it did not materially breach the agreement because the contract contains no explicit time is of the essence provision. This argument is unavailing. An express provision is not required to make time of the essence of the contract. *Grade v. Loafman,* 314 Mich. 364, 367, 22 N.W.2d 746 (1946). "The general rule is that time is not to be regarded as of the essence of a contract unless made so by express provision of the parties

or by the nature of the contract itself or by circumstances under which it was executed." *MacRitchie v. Plumb*, 70 Mich.App. 242, 246, 245 N.W.2d 582 (1976). Under the circumstances here, the parties agreed to a deliberately aggressive schedule and it was obvious that time was of the essence. The sludge storage facilities drawings had to be complete by December 1998 so that the city could take advantage of the 1999 construction season and the tanks could be built by October 1999. Proceeding otherwise, as both parties were aware, meant that the city would have to continue treating wastewater under the defunct Zimpro system and forgo storing sludge for later sale. Clearly, the city was concerned about time and CTE was aware of this when both parties agreed to the schedule.

*7 CTE also argues that the trial court clearly erred by ignoring evidence on the record showing that the parties mutually agreed to later deadlines once CTE missed the initial deadline. However, the city's engineer heading the project, Mr. Kremarik, testified that when CTE missed its deadlines, the city opted not to cease the project due to CTE's delays because doing so would further delay the project. According to Mr. Kremarik, the city permitted CTE to push the deadlines back in hopes of moving the project forward, but the city's willingness to continue working with CTE was never meant to be an extension or approval of the deadlines. Apparently, despite later adjustments of the deadlines, the trial court chose to believe the city's witness that the parties had initially intended to complete the project on an aggressive schedule and never mutually agreed to an extended schedule. To the extent that the evidence conflicted regarding the parties' intent as to deadlines or why those deadlines were moved back, the matter is a credibility issue, and this Court must defer to the trial court's determination regarding witness credibility. *Johnson v. Johnson*, 276 Mich.App. 1, 11, 739 N.W.2d 877 (2007). It is not our duty to substitute our judgment on such matters. *Id.* Accordingly, the trial court did not commit clear error requiring reversal.

Having concluded that the trial court properly found that CTE materially breached the contract, it is not necessary for us to consider the remainder of CTE's arguments regarding the court's other bases for finding that CTE breached the contract.

B. Termination Clause

CTE next argues that it cannot be liable for breach of the contract because the city failed to provide the contractually agreed upon notice of breach. In CTE's view, section 10 of the contract obligated the city to give CTE written notice if the city chose not to proceed with the project or was going to claim breach of contract. It follows, according to CTE, that the city's failure to abide by section 10 requires reversal of the lower court's judgment. We are not of the same opinion.

Section 10 of the contract provides:

> 10. *Termination.* The obligation to provide further services under this agreement may be terminated by either party upon seven (7) days written notice in the event of substantial failure of the other party to perform in accordance with the terms of this agreement through no fault of the terminating party. Also, the City reserves the right to terminate this agreement upon the aforesaid seven days written notice in the event the city elects to delete the project, change the scope of the project, or seek another engineering firm to provide professional engineering services in connection with the project. However, the Engineer will be paid for the actual services satisfactorily rendered to date of termination, including the associated prorated share of the profit.

The city admits that it never sent CTE any such notice of termination. Rather, the parties' relationship ended when the city did not accept CTE's December 1, 2000, proposal to redesign the treatment system.

*8 In our view, the fact that CTE never provided any notice to terminate consistent with section 10 is immaterial. The gist of plaintiff's argu-

ment is that because the city breached by failing to abide by section 10, the city is barred from recovering on its contract theories. However, it is the "rule in Michigan ... that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Able Demolition, Inc. v. City of Pontiac,* 275 Mich.App. 577, 585, 739 N.W.2d 696 (2007) (citations omitted). Here, CTE was the first party to substantially breach the contract: Delays in phase II occurred before the city failed to terminate the agreement without written notice. Given these facts, the city's supposed breach is irrelevant. CTE was the first party to substantially breach the agreement and, therefore, cannot maintain a cause of action for breach of contract against the city. Moreover, CTE has cited no supporting authority for the proposition that a party's subsequent breach somehow negates its claims against the initially breaching party or precludes judgment in its favor. Accordingly, CTE's argument that reversal is required because the city failed to comply with section 10 is unavailing.[FN3]

> FN3. While the trial court reached the right result, it erred in its reasoning. The trial court rejected CTE's argument regarding section 10 on the basis that that section did not require the city to provide CTE with written notice in the event that it elected to terminate the agreement for reasons other than "substantial failure ." The trial court indicated that "[n]othing about any kind of notice was mentioned in ... sentences [subsequent to the first sentence of section 10]." In other words, the trial court concluded that the city did not violate section 10 because that section did not require written notice of termination. This is clear legal error. The second sentence of section 10 makes a plain reference the city's ability to terminate the agreement for reasons other than substantial failure "upon the aforesaid seven days written notice...." Although the trial court's reasoning was incorrect, the result was proper and we will not reverse on this basis. *2000 Baum Family Trust v. Babel,* —Mich.App —, —; — NW2d — (2009).

IV. Damages

Finally, CTE argues that the trial court erred by incorrectly calculating the amount of interest owed on the judgment. The trial court's decision to award common law interest based on the evidence presented is reviewed for an abuse of discretion. *Reigle v. Reigle,* 189 Mich.App. 386, 393–394, 474 N.W.2d 297 (1991). Further, we review an award of prejudgment interest pursuant to MCL 600.6013 de novo. *Everett v. Nickola,* 234 Mich.App. 632, 638, 599 N.W.2d 732 (1999).

A. Pre-filing Interest

CTE first contends that the trial court erred by computing the award of common law interest from the date the city made payments to CTE. Rather, in CTE's view, the interest should have been calculated from the date the city filed its counterclaim. We disagree.

Michigan law has long recognized the common law doctrine of an award of interest as an element of damages.[FN4] *Gordon Sel–Way, Inc. v. Spence Bros., Inc.,* 438 Mich. 488, 499, 475 N.W.2d 704 (1991); *Banish v. City of Hamtrmack,* 9 Mich.App. 381, 395, 157 N.W.2d 445 (1968). The doctrine recognizes that money has a "use value" and an award of interest as an element of damages compensates the winning party for the lost use of its funds. *Gordon Sel–Way, Inc, supra* at 499, 475 N.W.2d 704. "[T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation [to the prevailing party.]" *Id.; Banish, supra* at 399, 157 N.W.2d 445.

> FN4. Interest as an element of damages should not be confused with interest awarded on a judgment sanctioned by statute. "The [former] is awarded by the jury as part of the general verdict. The [latter] is computed on and added to the general ver-

dict." *Vannoy v. Warren,* 26 Mich.App. 283, 288, 182 N.W.2d 65 (1970).

Here, the parties do not dispute whether interest is due as an element of damages. Rather, the core of the dispute is when the interest should begin to run. Generally, interest is allowed from the date of the injury or the date the damage occurs. See *Herman H Hettler Lumber Co. v. Olds,* 242 F. 456 (C.A.6 1917) (affirming award of common law interest measured from date money was owed on a contract); *Wilson v. Doehler–Jarvis Div. of Nat'l Lead Co.,* 358 Mich. 510, 519, 100 N.W.2d 226 (1960) (holding in a worker's compensation action that interest should be awarded from the date that the payor should have paid the employee); *Currie v. Fiting,* 375 Mich. 440, 454, 134 N.W.2d 611 (1965) (concluding in a wrongful death action, that interest should be determined, not on the date the claim was filed, but from the date of the decedent's death); see also *Vannoy v. Warren,* 26 Mich.App. 283, 288–289, 182 N.W.2d 65 (1970) (same). In other words, in a contract action, interest as a matter of damages should begin to accrue when, as a result of one party's breach, the other party suffers damage. Michigan's model civil jury instructions are consistent with this interpretation. SJI2d 53.04 advises tribunals to instruct juries, as follows: "If you decide plaintiff has suffered damages, you should determine when those damages began, and add interest from then to [the date the complaint was filed]...." [FN5] Thus, as the trier of fact in this matter, it was within the trial court's discretion to determine when the damages the city suffered began.

FN5. We note that this date is not necessarily the same date on which a party's claim accrues. A contract claim accrues at the time when the wrong upon which the claim is based is committed. See MCL 600.5827; see *Cushman v. Avis,* 28 Mich.App. 370, 373, 184 N.W.2d 294 (1970) ("A claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results.").

*9 Here, the city paid CTE for phase II services that was submitted late, incomplete, and ultimately found to be defective. The city was deprived of the use of its money once it paid CTE those funds. After a review of this evidence, the trial court determined that, in order for the city to be made whole, interest should begin to run from the date the city paid CTE. We find no error with this conclusion. The trial court's decision awarding interest from the date of the initial payments was consistent with the goal of awarding interest as damages to fully compensate the prevailing party. Clearly, this decision was based on this legitimate rationale and supported by the evidence in the record. Even if we could have arrived at a different measurement of interest had we been sitting as the trier of fact, it is not our place to substitute our judgment for that of the trial court. See *People v. Babcock,* 469 Mich. 247, 268–271, 666 N.W.2d 231 (2003). Rather, because the trial court's decision was within the range of principled outcomes, we defer to its judgment. *Id.* Accordingly, we conclude that the trial court's decision to calculate interest beginning from the date the city lost use of its funds was not an abuse of discretion.

B. Post–Trial Interest

CTE also argues that the judgment should not have included interest for the 16 months it took for the court to issue its opinion after the conclusion of trial. In CTE's view, this 16–month period was not its fault, and therefore interest should be disallowed. Again, we disagree. Under MCL 600.6013 the imposition of statutory interest is mandatory and must be assessed from the date the complaint was filed. *Hadfield v. Oakland Co. Drain Comm'r,* 218 Mich.App. 351, 357, 554 N.W.2d 43 (1996). However, statutory prejudgment interest will not accrue where the delay is not the fault of, or caused by, the debtor. *Heyler v. Dixon,* 160 Mich.App. 130, 152–153, 408 N.W.2d 121 (1987). Typically, this rule applies only under certain exceptional circumstances, for example, where court files have

been lost by court personnel, *Eley v. Turner,* 193 Mich.App. 244, 246–247, 483 N.W.2d 421 (1992), where the proceedings have been stayed pending the outcome of relevant parallel proceedings, *Heyler, supra* at 153, 408 N.W.2d 121, or where the proceedings were stayed by statute due to the opposing party's insolvency, *Rodriguez v. Solar of Michigan, Inc.,* 191 Mich.App. 483, 494–495, 478 N.W.2d 914 (1991).

In the present matter, it cannot be said that the delay was caused by CTE. Rather, it appears that the 16–month delay was due to the trial court's delay in issuing its opinion. Nonetheless, we cannot conclude that the trial court erred by allowing the statutory interest, as the facts of this case do not present the type of unusual circumstances justifying the disallowance of such interest. To conclude otherwise would allow CTE to retain the funds interest free contrary to the purpose of MCL 600.6013, which is to compensate the prevailing party for the very same delay in receiving those damages. *Coughlin v. Dean,* 174 Mich.App. 346, 352, 435 N.W.2d 792 (1989). The trial court did not err by refusing to deduct the post-trial interest from the judgment.

*10 Affirmed.

Mich.App.,2009.
Consoer Townsend Envirodyne Engineers Inc. v. City Of Grand Rapids
Not Reported in N.W.2d, 2009 WL 3013258 (Mich.App.)

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Westlaw.

Not Reported in N.W.2d, 2003 WL 21299926 (Mich.App.)
(Cite as: 2003 WL 21299926 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
GENO ENTERPRISES, INC., Plaintiff-Appellant/Cross-Appellee,
v.
NEWSTAR ENERGY USA, INC., Defendant-Appellee/Cross-Appellant.

No. 232777.
June 5, 2003.

Before: SMOLENSKI, P.J., and WHITE and WILDER, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff Geno Enterprises, Inc. (GEI), appeals by leave granted the circuit court's affirmance of the district court's order of judgment allowing defendant Newstar Energy USA, Inc. (Newstar), an opportunity to cure its breach of an oil lease and thereby avert the issuance of a writ of restitution. Newstar cross-appeals the determination that it breached the lease. We affirm the court's determination to deny an unconditional judgment of possession. The cross-appeal is moot.

I

Newstar is a wholly owned subsidiary of Newstar Resources, a publicly traded Canadian corporation. Newstar is in the oil exploration business and owns numerous wells in Michigan and other states. Newstar is the holder of a lease giving it the right to use certain property of plaintiff GEI to drill for oil under Saginaw Bay.

On March 30 1999, GEI filed a complaint in district court under the summary proceedings act, M.C.L. § 600.5701 *et seq.*, seeking a writ of restitution removing Newstar from the premises. GEI's complaint claimed Newstar had violated and breached "several express covenants and provisions" of the lease, that more than thirty days had passed since Newstar had received GEI's written notice of the violations, that Newstar was in default under the lease, and that, pursuant to the lease, Newstar's rights thereunder had ceased and been terminated. Newstar's answer to GEI's complaint included the affirmative defenses of lack of jurisdiction, waiver, laches/estoppel, and that it had paid GEI all royalties required under the agreement, although it noted that GEI returned several of those checks in July 1999.

At the bench trial on October 13, 1999, GEI stipulated to try three grounds for Newstar's default: failure to provide proof of liability insurance, failure to provide proof of a $50,000 clean-up bond, and failure to provide seismic data relating to the drill site. The district court found in defendant Newstar's favor on the first two grounds, but concluded (after amending its factual findings [FN1]) that Newstar had violated the lease by not fully providing seismic data to GEI. The court concluded, however, that Newstar's breach was not a material breach warranting termination, and granted Newstar additional time to comply fully with the lease's seismic data requirement.

FN1. The district court initially concluded that Newstar did not breach the seismic data requirement. The court later granted plaintiff's motion to amend findings on the seismic data issue, noting that it had presumed, improperly, that the two Shell lines had been drilled after the Geno 1-18 well, when in fact they were drilled before. The court noted, however, that the amended findings did not change its conclusion that there was no material breach of the lease by Newstar.

GEI appealed to the circuit court, and Newstar cross-appealed. The circuit court affirmed the district court and dismissed Newstar's cross-appeal.

A

At trial, the evidence showed that on January 20, 1994, Florence Geno, as lessor, and Jeffrey A. Foote, as lessee, entered into a "surface lease agreement" for the use of Geno's land to drill a gas well under Saginaw Bay. Florence Geno's attorney drafted the lease. The lease was for a primary term of thirty-six months and "as long thereafter as oil and/or gas are being produced or capable of being produced in paying quantities ..."

The surface lease provided in pertinent part:

D. *DEFAULT OF LEASE*

*2 1. In the event Lessor shall determine a default in the performance by Lessee of any express or implied covenant of this lease, Lessor shall give notice, in writing, by certified United States mail, addressed to Lessee's last known address, specifying the facts by which default is claimed. Lessee shall have thirty (30) days from the date of receipt of such notice in which to satisfy the obligation of Lessee, if any, with respect to Lessor's notice.

K. *RELEASE CLAUSE*

If the Lessee fails to comply with the terms and conditions stipulated in this lease, then and in such events all of his rights hereunder shall cease and determine, and thereupon he or his assigns shall execute written release of said premises to said Lessor and his assigns.

L. *ADDITIONAL PROVISIONS*

2. Lessee shall provide Lessor with a copy of all title opinions, geological information (including logs, *seismic,* geochemistry and topographical maps) and other information regarding the lands covered by exploration activities from the leased premises *within sixty (60) days after the completion of any well drilled from the leased premises at no cost;* provided, however, that all such data and information shall remain the sole property of Lessee and Lessor will not make the same available to third parties without prior written consent from Lessee. *This information will be provided by Lessee upon written request from Lessor.* [Emphasis added.]

Florence Geno conveyed the property and her interest in the surface lease to plaintiff GEI in January 1994. In 1995, Foote had a gas well known as "Geno 1-18" drilled from a 300 foot by 300 foot parcel of the GEI property to a bottom hole under Saginaw Bay. Foote assigned his leasehold interest to Newstar in 1997.

Wayne Geno testified at trial that GEI received and cashed royalty checks from Newstar until January 1999, totaling approximately $302,000. Around January 1999, one of Newstar's royalty checks to GEI bounced due to insufficient funds. By letter dated January 19, 1999, GEI wrote to Newstar that it was in breach of the lease, for reasons including failure to provide seismic data under paragraph L(2) of the lease,[FN2] quoted *supra.* Newstar responded by a letter which was dated February 18, 1999,[FN3] but was mailed on March 3 or 8, 1999. Newstar's Michael Barratt further responded to GEI's January 19, 1999, by letter dated March 8, 1999, included with which was some seismic data. [FN4]

FN2. Wayne Geno's letter to John Piedmonte, Newstar's president, dated January 19, 1999 stated in part:

Dear Mr. Piedmonte:

This letter is to notify you that Newstar is in breach of contract. We have not been paid in a timely manner as per the agreement to lease the surface property located in Pinconning, Michigan to oper-

ate a gas well ... The following will need to be satisfied within thirty (30) days from this date:

1. Par B.2.-Supply all moneys due GEI immediately and all payments are to be brought up-to-date within the time frame specified above....

2. Par L.2.-All Seismic data pertaining to this well is to be supplied to GEI within ten (10) days of the issuance of this let- ter.

The above items are due on or before the date specified or further action will be taken.

FN3. Newstar's letter to GEI dated February 18, 1999 stated in pertinent part:

Thank you for your January 19, 1999 letter regarding the above referenced surface lease agreement. The purpose of this letter is to address your requests identified in that letter....

• All monies due to Geno Enterprises, Inc. (GEI) have been paid ...

• As you are aware, Newstar did not generate the data to support drilling the Geno 1-18 nor was it the operator during the drilling operation. Any seismic data that you requested should have been previously provided to you. I will, however, make sure copies of the seismic are provided to you. You can expect this to be delivered to you under separate cover within the next two weeks. Please be advised that pursuant to paragraph L.2 of the surface agreement, this seismic data remains the sole property of Newstar and GEI [Geno] may not make this seismic available to any third party without the prior written consent of Newstar. [Pl's trial exh 1.]

FN4. Newstar's (Barratt's) letter to Geno dated March 8, 1999 stated in part:

This letter is in response to your January 19, 1999 letter to Mr. John A. Piedmonte requesting that seismic data pertaining to this well is to be supplied to GEI.

Mr. Piedmonte responded earlier to you in his February 18, 1999 letter addressing your concerns.

Please find enclosed the portion of seismic line NS-SB-1-97 that traverses the State Fraser & Geno # 1-18 producing unit. I am also enclosing a shot point map along with the line. This is the only line which Newstar has ownership of within the unit. The portion of the enclosed line is from the Northwest end of the line to shot point 90. Shot point 90 crosses the South unit line. The bottom hole location of the St. Fraser and Geno # 1-18 is located approximately at shot point 50.

If you need additional information or have any questions regarding the seismic lines, please contact me at the above address.

By letter dated March 22, 1999, GEI's counsel informed Newstar that the lease had terminated as of February 18, 1999.[FN5] GEI filed a summary proceedings action in district court on March 30, 1999.

FN5. The March 22, 1999 letter terminating the lease stated:

Dear Mr. Piedmonte:

We have been authorized, as attorneys for Geno Enterprises, Inc., to inform you that the surface lease agreement dated January 20, 1994 (Liber 1367, Pages 241-248) is terminated effective Febru-

ary 18, 1999. The lease has been terminated due to the default and failure of Newstar Energy USA, Inc., to comply with the terms and conditions of the lease agreement, specifically, its failure to satisfy its obligations with respect to the notice of default dated January 19, 1999, in the following regards:

4) Failure to provide Plaintiff with a copy of geological information, including seismic data and other information regarding the lands covered by exploration activities from the leased premises within 30 days from the date of service of notice; and

5) Failure to satisfy the Lessees [sic] obligations with respect to the Plaintiff's notice within 30 days from the date of receipt of the notice.

Accordingly, on behalf of Geno Enterprises, Inc., we hereby demand immediate possession of the premises upon which the State Fraser Geno 1-18 well is located....

Pursuant to the terms of the lease agreement, it is necessary that Newstar Energy USA, Inc., vacate and remove itself, its employees, agents ... from the premises, cease any further activity on the premises, and deliver up to Geno Enterprises, Inc., possession of the premises. Furthermore, Paragraph K of the lease agreement requires that Newstar Energy USA, Inc., execute the enclosed release of said premises. Newstar Energy USA, Inc., will be considered a "holdover tenant" if it fails, refuses or neglects to comply with the terms and conditions of the lease agreement and does not immediately vacate and remove itself from the premises.

Testimony adduced at the bench trial included that seismic lines are typically run for future exploration. A map admitted at trial showed drilling units and seismic lines that had been shot in the pertinent area, and that three seismic lines were involved. The three seismic lines were about seven miles, three miles, and five miles long. Defendant Newstar ran the five mile seismic line in 1997, and provided seismic data pertinent to that line to GEI. The other two seismic lines had been run before Jeff Foote drilled the Geno 1-18 well in 1995. Shell Oil had licensed those two lines to Jeff Foote. Under licensure, the licensee is prohibited from showing the seismic lines to a third party. GEI had requested the Shell seismic data from Foote, but Foote refused because the information was li- censed.

*3 Wayne Geno testified at trial regarding the seismic data:

Q. Let's move on to seismic. Now, th-this well was drilled back in 1995, correct?

A. I believe so.

Q. And the lease is back in 1994. And the lease says that there's seismic information that-that you want within 60 days after completion of the well, correct?

A. Yes.

Q. So-so, any request in 1999 for seismic information is somewhere around four years late, correct?

A. Yes.

Q. And during that time there was never a termination notice sent sayin' 'we haven't gotten seismic and we're gonna terminate your lease'?

A. To Newstar? No.

Q. How about to Mr. Foote?

A. We requested that data from Mr. Foote, and he

would not give it to us. I did not request a termination [of the lease from Foote].

Q. Well, isn't it-isn't it correct that Mr. Foote gave you the same reason that Mr. Piedmonte stated earlier today for not giving the seismic information, and that's that it was not information that he could give to you, it was licenses?

A. It was licensed.

Q. Okay. Now Iit's also true about the seismic that you don't really know for sure what seismic data even pertains to this well?

A. What seismic data pertains to this well? I do not-

Q. Correct.

A. -I do not know 'cause I've not seen it.

Q. But a-as a general standpoint, you-you couldn't tell me-you know, take a map and tell me 'this is what pertains to this well and this doesn't'?

A. Probably not.

Q. Now, it's also true that-that there's been no harm to Geno Enterprises by not having that seismic data has there?

A. I believe there has because we tried to negotiate with Mich. Con earlier to do a well east of this well-

Q. So-so, the reason that there is damage to you then would be that you wanted to use this data to negotiate with somebody else?

A. No. It was -

Q. Well, ththat's what you just said.

A. It was to keep us informed of what's out there.

Q. So-so, you wanted to know what was out there so that you could negotiate with somebody else

A. For what?

Q. I don't know for what, for

A. For-for -

Q. -another well, correct?

A. -for another well east of this well.

Q. Thank you.

A. If we needed it.

B

The district court applied the material breach doctrine, concluding on the seismic issue:

> 8. MATERIAL BREACH IS AN EQUITABLE DEFENSE: The Defendant asserts that even if all is well with the Plaintiff's attempt to terminate the lease, the breach was not material and therefore the termination should be unenforceable. This is an equitable defense which the Court is considering pursuant to M.C.L. § 600.8302(1) & (3). [FN6] Section (3) states "... the District Court may hear and determine an equitable claim relating to ... or involving a right, interest, obligation, or title in land." It goes on to provide that the District Court may enter a judgment or order to effectuate its ruling. The question then becomes as a matter of law does the equitable doctrine of material breach apply to the exercise of a power to terminate contained in a lease.

FN6. MCL 600.8302(1) provides:

> Sec. 8302. (1) In addition to the civil jurisdiction provided in sections 5704 and 8301, the district court has equitable jurisdiction and authority concurrent with that of the circuit court in the matters and to the extent provided by this sec- tion.

> Subsection (3) provides:
>
> (3) In an action under chapter 57, the district court may hear and determine an equitable claim relating to or arising under chapter 31, 33, or 38 involving a right, interest, obligation, or title in land. The court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection ...

*4 There are no cases involving leases on point in Michigan. The case of Erickson v. Bay City Glass Company, cited by the Defendant, uses the word "material," but the decision did not turn on that issue. That case held that where a power to terminate the lease does not expressly include a breach for non-payment of rent, the lease may not be terminated for non-payment of rent because the non-payment of rent provisions contained in M.C.L. § 600.5714 and M.C.L. § 554 .134 are applicable.

Many cases dealing with the "material breach" issue can be found in the law of contract as it applies to the remedy of recission [sic rescission] which is similar to the contractual remedy of termination. Many Michigan cases holding the applicability of the "no material breach" or "substantial performance" equitable defense to contract recission [sic] may be found in West's Michigan Digest Contracts 95K261(2) (see Omnicom of Michigan v. Giannetti Inv. Co., 561 N.W.2d 138, 221 Mich.App. 341, 1997). This doctrine exists to avoid harsh results when a contract has been substantially performed, the aggrieved party has received most of the agreed upon benefits, and the aggrieved party has other remedies available.

Another example of the law of contract that seeks to avoid harsh results is the doctrine holding that agreed upon damage provisions, liquidated damages, in a contract are unenforceable where they are excessive and do not reasonably relate to damages that are likely to occur. Another example where the law of contract avoids a recission [sic] or breach of contract is the "time is of the essence doctrine," which states unless it is otherwise specified, late performance within a reasonable time is not grounds for a recission [sic] (see also M.C.L. § 440.616). A final example of the law seeking to avoid harsh results is found in the land contract forfeiture provisions. MCL 600.5726 expressly requires a "material breach" before a forfeiture may be declared. However, the Plaintiff on this point could argue that if the legislature wanted to require a material breach prior to the exercise of a power to terminate, it would have placed that requirement in the [summary proceedings] statute, as it did in the land contract forfeiture cases. This Court's best guess is that the equitable defense of "material breach," which seeks to avoid harsh results for minor breaches, is applicable to the exercise of a power to terminate contained in a lease especially in view of the fact that policy considerations for cancellation of contracts and cancellation of leases seem to be the same. If this legal conclusion is incorrect, this is a classic situation where hard cases make bad law.

[¶ 9. court applies the material breach/substantial performance considerations of *Omnicom, supra.*]

In considering all of the above, this Court finds that the Defendant's breach was not a material breach warranting a termination. The Defendant has performed all of its other duties under the lease, including paying the Plaintiff sums due under the lease. The Court is very reluctant to refrain from enforcing the specific terms of the lease but believes that the Plaintiff has suffered little damage, has had substantial performance, and is trying to use a relatively minor and negligent violation of the lease to terminate it. Under these circumstances, the Court believes that an immediate termination is not fair and therefore, an unconditional judgment for possession is denied. The Plaintiff however is entitled to the

Shell lines and, therefore, is granted a judgment for possession that provides that the lease shall be terminated and a writ of restitution will issue in the event that the two Shell lines are not provided to the Plaintiff within 28 days of the judgment. *This remedy is not expressly authorized by the summary proceedings statute but is entered pursuant to MCLA 600.8302(1) & (3)* [see n 7, *supra*]. This judgment for possession shall be processed in the same manner as any other summary proceedings judgment. In the event a higher court finds that the "material breach" defense is not applicable, an unconditional judgment for possession with a ten day writ of issuance period should be entered in favor of the Plaintiff. [Emphasis added.]

*5 The district court's order of judgment allowed Newstar time to cure its breach:
Judgment for possession is entered in favor of the Plaintiff [Geno], subject to the Defendant's right to cure the existing breach by providing two Shell seismic lines to the Plaintiff on or before *September 26, 2000* (28 days after the date of this Judgment) in which case the parties lease shall not be terminated and no writ of restitution will issue.

On all other claims, judgment is entered for the Defendant [Newstar]. In the event a higher court finds that the "material breach" defense is not applicable, judgment should be entered in favor of the Plaintiff for the technical violation.

The circuit court affirmed, and dismissed Newstar's cross-appeal. Post-trial, Newstar purchased a license for the two Shell lines' seismic data and provided that data to GEI, in compliance with the district court's judgment.

II

Whether the doctrine of material breach may be applied in a summary proceedings action involving a lease is a question of law this Court reviews de novo. *Omnicom of Michigan v. Giannetti Investment Co,* 221 Mich.App 341, 348; 561 NW2d 138 (1997). The trial court's factual findings will not be overturned unless clearly erroneous. *Id.*

A

GEI is correct that the material breach doctrine arises in rescission cases, and that rescission is not the same as forfeiture, the latter of which is the theory plaintiff advanced in this action:

§ 450. Provisions for forfeiture

A forfeiture, is that which is lost, or the right to which is alienated, by a breach of contract. Unless there is a provision in a contract clearly and expressly allowing forfeiture, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract expressly provides them. The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of it. It puts an end to the contract and extinguishes it in accordance with its terms similarly to the manner in which it is extinguished by performance. Forfeiture terminates an existing contract without restitution, while a rescission of such contract terminates it with restitution and restores the parties to their original status. [17B CJS, Contracts, § 450, pp 66-67.]

There are no Michigan cases addressing the question whether the material breach doctrine, applicable in rescission cases, may be applied in a summary proceedings action to declare a lease forfeited. Nevertheless, we conclude that the court did not err in applying the doctrine in the instant case.

There is no Michigan precedent compelling a court to automatically declare a forfeiture under a contract provision without looking to the equity of the situation. See 49 Am Jur 2d, Landlord and Tenant, § 339, "Equitable Relief From Forfeiture," which states in pertinent part:

*6 Forfeitures are not favored in equity, and un-

> less the penalty is fairly proportionate to the damages suffered by reason of the breach, relief will be granted against a forfeiture where the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred. Thus, equitable relief against forfeiture of a lease is generally granted in all cases of nonpayment of rent if such payment is delinquently made or tendered, unless there is some ground for denying such relief, and relief against forfeiture of a lease is generally granted in cases other than those for nonpayment of rent, where the grounds for relief are fraud, accident, or mistake. *Likewise, a lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result, or to prevent an unconscionable advantage to the lessor ... This is particularly true where the breach is of a covenant of minor importance,* as, for example, where a tenant's default under the lease is a technical one and the tenant has duly paid rent and taxes on the property over a long period of time, has substantially complied with the other lease obligations, and offers promptly to cure the default.
>
> Equity may also relieve a lessee from a default in breaching a covenant of the lease where the lessor's right to cancel the lease has been waived. [49 Am Jur 2d, *supra* at pp 304-305. Emphasis added.]

Applying these principles, we find no error. There was evidence that Newstar had a substantial investment in the property, had otherwise complied with the lease, and that GEI could be made whole.

B

GEI also argues that M.C.L. § 554.46 implicitly rejects application of the material breach doctrine in forfeiture actions where the breach is not nominal, and since the lower courts in the instant case both concluded Newstar's breach was not nominal, the court's rulings violated the clear intent of the standard imposed by the Legislature.

MCL 554.46 provides:

> When any conditions annexed to a grant of conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

MCL 554.46 does not set the upper limit of any threshold, but rather sets a minimum threshold. See M.C.L. § 600.5744(6), which provides that a land contract forfeiture clearly requires a material breach.

III

Although we have determined that the district court did not err in permitting Newstar to avoid the forfeiture by providing the seismic data, and Newstar's cross appeal is therefore moot, Newstar having provided the data, we nevertheless address one aspect of the cross-appeal as an alternative basis for affirming the trial court's denial of an unconditional judgment of possession. We conclude that the trial court erred in rejecting Newstar's claim that GEI waived its right to declare a forfeiture for failure to provide the seismic data.

*7 The Supreme Court in *Van v. Zahorik,* 460 Mich. 320, 336; 597 NW2d 15 (1999), stated the requirements for equitable estoppel:

> Equitable estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.

See also 49 Am Jur2d, Landlord and Tenant, §§ 328, 329, pp 295-296, which states in part:

> Forfeiture of leases is not favored, and the courts will readily adopt any circumstances that indicate waiver of forfeiture.
>
> The existence of a waiver of the right to terminate a lease is a question of fact for determination by the trier of fact. The right of forfeiture may be waived either expressly or by the lessor's conduct. Generally, any act by a landlord which affirms the existence of a tenancy and recognizes the tenant as the lessee, including the failure to exercise the remedy of forfeiture, after the landlord has knowledge of a breach results in the landlord's waiver of the right to a forfeiture. Thus, a lessor's conduct constitutes a waiver of the right to enforce a forfeiture where, after a fire, the lessor commences restoration of the premises and fails to communicate to the lessee the intention to rely upon a lease term providing for termination in the event of fire.
>
> No waiver occurs, however, where the lessor acts promptly to terminate the lease upon learning of the lessee's breach of a covenant....
>
> § 329. Delay in declaring forfeiture; consent to, or acquiescence in, breach
>
> ... where ... a lessor delays unreasonably in declaring a forfeiture of a lease the forfeiture is deemed to have been waived.
>
> A lessor who consents to acts of the lessee which otherwise would constitute ground for a forfeiture will not be permitted to enforce a forfeiture, because there is in such a case no breach by the lessee.

In the instant case, plaintiff GEI delayed for years before requesting seismic data or enforcing a forfeiture on the basis of the seismic data requirement. The Geno 1-18 well was drilled in 1995 by Foote. The lease provision stated both that the data was required to be provided within sixty days after the completion of any well drilled, and that the data will be provided upon written request from the lessor. GEI requested the seismic data from Foote, but he refused to provide it because it was under license, and the matter was not pursued. Foote assigned his interest in the lease to Newstar in 1997, after the data was due under lease, after it had been requested and denied, and after GEI waived its right to declare a forfeiture based on that denial. GEI first requested the seismic data from defendant Newstar in January 1999. Newstar is correct that the district court did not address plaintiff's conduct before it sent Newstar the termination letter in January 1999, as evidenced in the district court's opinion:

> *8 7. EQUITABLE ESTOPPEL/WAIVER: The Court finds that the Plaintiff *at all times from January 19, 1999* conducted itself in a manner that was consistent with terminating the lease. The original 30 day notice of default threatened further action if the alleged breaches were not cured. The Plaintiff did send a termination notice in March, although it was not required to do so. Shortly thereafter, the Plaintiff commenced a summary proceedings action to have the Defendant removed from the premises. The Court cannot find any conduct on the part of the lessor that would constitute a waiver of the exercise of the power to terminate the lease. In addition, any theory of estoppel is not supported by the facts since the Plaintiff did not engage in any conduct that would have caused the Defendant to take a position or action in reliance on representations or conduct it may have engaged. [Emphasis added.]

Notwithstanding the trial court's observations concerning GEI's conduct after January 19, 1999, prior to that date GEI very clearly waived its right to forfeit the lease based on the failure to provide seismic data relating to the Geno 1-18 well, drilled in 1995, and led Foote and Newstar to believe that it did not read the lease as requiring the production of seismic data that was subject to license.

We affirm the court's determination to deny an unconditional judgment of possession. We grant no relief on the cross-appeal because Newstar has

already complied with the terms of the conditional judgment.

Mich.App.,2003.
Geno Enterprises, Inc. v. Newstar Energy USA, Inc.
Not Reported in N.W.2d, 2003 WL 21299926 (Mich.App.)

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